Wachtell, Lipton, Rosen & Katz

Takeover Law and Practice

2022

This outline describes certain aspects of the current legal and economic environment relating to takeovers, including mergers and acquisitions and tender offers. The outline topics include a discussion of directors' fiduciary duties in managing a company's affairs and considering major transactions, key aspects of the deal-making process, mechanisms for protecting a preferred transaction and increasing deal certainty, advance takeover preparedness and responding to hostile offers, structural alternatives and cross-border transactions. Particular focus is placed on recent case law and developments in takeovers. This edition reflects developments through March 2022.

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Takeover Law and Practice

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Takeover Law and Practice

I.

Current Developments

A. Overview

The last several decades have witnessed a number of important legal, financial and strategic developments relating to corporate transactions. Many of these developments have complicated the legal issues that arise in connection with mergers and acquisitions, tender offers and other major corporate transactions. Changes in stock market valuations, macroeconomic developments, the financial crisis and associated policy responses, the COVID-19 pandemic, tax reform and changes in the domestic and foreign regulatory environment have added complexity. The substantial growth in hedge funds and private equity, developments in governance and ESG concerns, the growing receptiveness of institutional investors to activism and the role of proxy advisory firms have also had a significant impact.

The constantly evolving legal and market landscapes highlight the need for directors to be fully informed of their fiduciary obligations and for a company to be proactive and prepared to capitalize on business-combination opportunities, respond to unsolicited takeover offers and shareholder activism and evaluate the impact of the current corporate governance debates. In recent years, there have been significant court decisions relating to fiduciary issues and takeover defenses. While these decisions largely reinforce well-established principles of Delaware case law regarding directors' responsibilities in the context of a sale of a company, in some cases they have raised questions about deal techniques or highlighted areas where other states' statutory provisions and case law may dictate a different outcome than would result in Delaware or states that follow Delaware's model.

Section I of this outline identifies some of the major developments in M&A activity, activism and antitrust in recent years. Section II reviews the central responsibilities of directors, including basic case law principles, in the context of business combinations and takeover preparedness. Section III focuses on various preliminary aspects of the sale of a company, including the choice of method of sale, confidentiality agreements and use of financial advisors, while Section IV discusses the various structural and strategic alternatives in effecting private and public M&A transactions, including options available to structure the transaction consideration. Section V focuses on the mechanisms for protecting an agreed-upon transaction and increasing deal certainty. Section VI summarizes central elements of a company's advance takeover preparedness, particularly the role of a rights plan in preserving a company's long-term strategic plan and protecting a company against coercive or abusive takeover tactics and inadequate bids. Section VII discusses the special considerations that apply to cross-border transactions.

B. M&A Trends and Developments

1. Deal Activity

The year 2021 was a remarkable one on many levels for M&A and the transactional market. While it was, to a significant degree, a continuation of the incredibly strong market that began in the middle of 2020, few predicted such record-breaking activity at the outset of the pandemic just several months earlier. Records were shattered across every dimension—M&A volume and number of transactions, in the United States and globally; private equity transactions; the SPAC phenomenon; and IPOs, to name just a handful. All in the midst of the ongoing COVID-19 pandemic, uncertainty regarding the timing of transitions from remote to conventional working arrangements, a volatile global economy, supply chain disruptions, more aggressive antitrust enforcement, and the prospect of increasing interest rates. These headwinds were overcome by improving economic conditions, unprecedented stimulus and central bank liquidity initiatives, uncertainty about whether potential tax reform would increase tax costs to sellers, low interest rates, increased optimism amongst corporate executives in the U.S. and across Europe as vaccine programs were successfully rolled out, and receptivity in the markets to announced transactions, among other factors. As a result of these and other dynamics, in 2021, total global deal volume was the highest it has been since recordkeepers began tracking M&A volume, with over $5.8 trillion of deals recorded for the year. Total global deal volume in 2021 increased more than 60% relative to the $3.6 trillion recorded for total global deal volume in 2020 and increased over 50% relative to the $3.8 trillion recorded for total global deal volume in 2019. Over 63,212 transactions were announced globally in 2021, a 24% increase to the 50,871 transactions announced in 2020.

The unprecedented levels of activity were driven in part by mega-mergers, including Canadian Pacific's $31 billion acquisition of Kansas City Southern (following a bidding war with attempted interloper Canadian National Railway in which Canadian Pacific ultimately emerged victorious), Square's (now Block's) $29 billion acquisition of Afterpay, AT&T and Discovery's deal to combine their media assets into a new publicly traded company with an enterprise value of approximately $132 billion, the $30 billion club deal for Medline involving Blackstone, Carlyle and Hellman & Friedman, and Oracle's $28.3 billion acquisition of Cerner, as well as blockbuster de-SPAC transactions, including Grab's $34.3 billion combination with a private equity-backed SPAC and MSP Recovery's $32.5 billion SPAC merger. That said, while mega-mergers were an important contributor to the year's overall M&A activity, deals above $25 billion constituted a proportionately lower percentage of deal volume than in 2020, likely reflecting hesitation to pursue large transactions in the current antitrust environment, in particular in industries that are the subject of geopolitical tensions and/or regulatory scrutiny such as technology, healthcare, and semiconductors.

In addition to whole company acquisitions, 2021 witnessed announcements of numerous high-profile separations, carveouts, and spinoffs, including 3M's combination of its food safety business with Neogen in a Reverse Morris Trust transaction valued at

$9.3 billion, General Electric's announcement of plans to spin off both its healthcare and renewable energy, power and digital businesses, creating three standalone public companies, Blackstone's $2.2 billion acquisition of a 9.9% stake in AIG's Life & Retirement business in connection with AIG's planned separation of the business, Johnson & Johnson's planned separation into two independent publicly traded companies by spinning off its consumer health business, eBay's sale of a majority of its Korean businesses to Emart for $3.8 billion and sale of part of its stake in Adevinta to Permira for $2.25 billion, Grupo Televisa's combination of its content and media assets with Univision in a transaction valued at $4.8 billion, and Dell's spin-off of its 81% equity ownership of VMware. Spin-offs, in particular, continue to be a focus of activists pushing companies to try to unlock shareholder value.

At the start of 2022, there have been a number of economic and geopolitical factors affecting the M&A landscape—the war between Russia and Ukraine, stock market volatility, interest rate increases by the Federal Reserve and high inflation, among other things. The effects of these factors also can be seen in the low number of IPOs and capital raised at the start of the year. It remains to be seen how such factors will play out throughout the rest of 2022 and their impact on M&A activity.

2. Technology M&A

The technology sector continued to drive M&A in 2021, with 21.3% of global M&A volume ($1.24 trillion) and 28.4% of U.S. M&A volume ($727 billion) involving a tech company on either the acquiror or target side (or both). Notable transactions included, among others, Square's $29 billion acquisition of Afterpay, Entegris's $6.5 billion acquisition of CMC Materials, Aurora Innovation's $11 billion de-SPAC transaction with Reinvent Technology Partners following the combination of Uber's self-driving business with Aurora, and Microsoft's $16 billion acquisition of Nuance. Private equity backed a record volume of tech deals in 2021, announcing over $400 billion in U.S. tech deals as compared to $196 billion in 2020. Significant PE-backed tech transactions included Thoma Bravo's $10.1 billion acquisition of cyber security firm Proofpoint and the $14 billion acquisition of McAfee by a consortium of PE investors.

The tech sector's continued strong performance was driven in part by the fact that many technology-focused businesses were less affected by—or even benefited from—the economic and social impact of COVID-19, as well as the need for companies to acquire new technologies to remain competitive in industries that are constantly innovating and changing, a trend that is unlikely to abate in 2022. As one example, logistics software became a highly desirable asset in 2021 given global supply chain disruptions – Panasonic's $7.1 billion purchase of an 80% interest in Blue Yonder, a U.S. supply chain software company, and American Eagle's $350 million acquisition of Quiet Logistics are just two illustrations of this trend. The burgeoning blockchain and cryptocurrency sector also witnessed growing M&A activity, with notable transactions including Galaxy Digital's $1.2 billion acquisition of BitGo.

At the same time, headwinds in the form of public interest and intense regulatory scrutiny could signal a more complex environment for tech companies in the coming year and beyond. Global regulators are closely examining transactions involving tech companies, in some cases even ordering companies to undo previously consummated transactions, such as the U.K. Competition & Markets Authority's ("CMA") order that Facebook (now Meta) divest Giphy to an approved purchaser and the Federal Trade Commission's ("FTC") late 2020 challenge to Facebook's acquisitions of WhatsApp in 2014 and Instagram in 2012 (which recently survived a second motion to dismiss). Further, various legislative bills currently pending in Congress have the potential to fundamentally reshape the ability of tech companies to engage in M&A and the costs to both buyers and sellers of doing so, including the Trust-Busting for the Twenty-First Century Act, which would prohibit companies over $100 billion from engaging in acquisitions that lessen competition "in any way," and the Competition and Antitrust Law Enforcement Reform Act, which would shift the burden of proof in certain sufficiently large or consequential transactions from the regulatory agencies to the merging parties, who would be required to establish that the acquisition will not materially harm competition. And in early 2022, the European Parliament and EU member states reached an agreement on the Digital Markets Act ("DMA"), which is expected to be effective as early as October 2022. Under the DMA, tech companies with a market capitalization of at least 75 billion euros or annual revenues within the EU of at least 7.5 billion euros in the past three years and who meet certain other requirements will be restricted from, among other things, giving preference to their services over the services of other companies, and must allow for interoperability between their apps and those of other companies. Fines for violating the rules will be up to 10% of the company's global revenues (and up to 20% for repeat offenders) and any company that breaks the rules at least three times in eight years may face market investigations and potentially a breakup of the company. It is reported that the SEC is engaged in early planning to amend the "held of record" definition, which would have the effect of subjecting a greater number of private companies to the extensive disclosure requirements applicable to public companies under federal securities laws. These changes, if implemented, would align with SEC Chairman Gary Gensler's commitment to increasing transparency, but would come at significant cost to private companies, including many Silicon Valley startups that typically rely on private funding for many years before going public. Relatedly, the London Stock Exchange is reportedly considering the creation of a special market for private companies to publicly trade shares in specified trading windows, which, if implemented, may be an attractive alternative to IPOs for private tech companies.

These and other regulatory developments reinforce the importance of conducting careful diligence and considering the possibility of prolonged regulatory review when allocating risk in transaction agreements, as well as utilizing creative legal and structural technology to ensure successful outcomes.

3. Unsolicited M&A

The volume of unsolicited deals increased globally both in absolute terms, from $166 billion in 2020 to $421 billion in 2021, and in terms of share of overall deal volume,

from 3% in 2020 to 7.5% in 2021. 2021 also saw an increase in the number of topping bids compared to 2020. As markets returned to normalcy after the early days of the COVID-19 pandemic, there arose greater opportunities for unsolicited acquirors to pursue targets that lagged behind their peers in recovering. At the same time, competition for targets intensified, as more potential acquirors entered the market, including a plethora of SPACs that have time limits on making acquisitions (as discussed in Section I.B.5), leading to more competition in some cases for certain targets. As an example of competition in unsolicited M&A, Cannae and Senator submitted a joint bid for Corelogic, which then adopted a poison pill and increased its stock buyback program in response. Ultimately, however, neither Cannae nor Senator was successful in acquiring Corelogic, which agreed to a deal with Stone Point at a higher price, showing that the competitive unsolicited deal environment can lead to deals other than with the original unsolicited acquiror. Overall, it remains challenging to successfully complete an unsolicited acquisition, and a thoughtfully executed defense may enable a target to retain its independence.

4. Private Equity Trends

Private equity was another primary driver of M&A activity in 2021, with global PE volume increasing approximately 111% in 2021 compared to 2020, ending the year at approximately $1.2 trillion worth of deals. The increased activity levels were fueled by, among other factors, the availability of capital and low interest rates, as well as the deployment of massive amounts of dry powder that PE firms had been amassing for the past few years during a rising market environment. As a result of these factors and others, PE was a major source of dealmaking in 2021 (approximately 20% of overall global M&A volume), notwithstanding market records and significant ongoing competition from strategic buyers.

Looking ahead, one trend to watch for is a possible resurgence of PE club deals (where two or more firms band together to buy a company), which had fallen out of favor following the 2008 financial crisis, but which may be coming back as PE firms look for opportunities to deploy significant capital in transactions involving large targets while strategic buyers face potential regulatory constraints. Indeed, 2021 witnessed the largest buyout involving a club of PE firms since the financial crisis, with the acquisition of Medline by Blackstone, Carlyle and Hellman & Friedman. Further, major PE players are planning additional capital raises projected to result in record-size funds and unprecedented levels of dry powder. Among many others, Blackstone and Apollo are reportedly preparing for major fundraising efforts (with Blackstone reportedly planning to target as much as $30 billion). We expect that sponsors will continue to pursue acquisitions and actively look for creative opportunities, with PE activity boosted by access to financing, as well as by a greater availability of potential targets as regulatory concerns cause hesitation among strategics and activists continue to prod companies to become more focused on just their core businesses.

5. SPAC Trends

In 2021, SPAC activity continued 2020's scorching pace, with a total of 613 SPAC IPOs priced over the course of the year – more than double the number that priced in 2020. A record-setting 289 de-SPAC transactions were also announced in 2021. Most of this SPAC market activity was concentrated in the first quarter of 2021, however. Both economic and regulatory headwinds resulted in the second quarter of 2021 marking the beginning of the end of the SPAC boom that had persisted since 2019. The decline has so far continued in 2022, with only 55 SPAC IPOs pricing in the first quarter, compared with 298 in the first quarter of 2021, and 34 de-SPAC transactions announced with an aggregate equity value of $43.5 billion, compared with 97 de-SPAC transactions with an aggregate value of $219.1 billion in the first quarter of 2021.

Growing concerns regarding perceived conflicts of interest between SPAC sponsors and unaffiliated investors and the rigor of disclosures, particularly financial projections, used to market some de-SPAC transactions have triggered heightened regulatory scrutiny over the past year, as the SEC and other regulators have grappled with the rise of SPACs as a means of bringing private companies to the public markets. In addition to bringing several notable enforcement actions against SPACs, their sponsors, and/or target company executives and announcing changes to its SPAC-related accounting guidance, the SEC began a wholesale reevaluation of the rules applicable to SPACs and de-SPAC transactions.

On March 30, 2022, by a three-to-one vote, the SEC proposed a significant package of new rules that would affect all participants in the SPAC market and all stages of the SPAC life cycle. The proposals represent a broad effort both to enhance protections for public SPAC investors and to narrow perceived gaps between the disclosure and liability regimes applicable to de-SPAC transactions and those applicable to traditional IPOs, which in the SEC's view have led to opportunities for regulatory arbitrage despite de-SPAC transactions functionally serving as the de-SPAC target's IPO.

A particular focus of the SEC's proposals is the use of financial projections by private targets going public through de-SPAC transactions – one key difference between de-SPAC transactions and traditional IPOs. In disclosing financial projections in de-SPAC transactions, practitioners have generally relied on a safe harbor in the Private Securities Litigation Reform Act ("PSLRA") for forward-looking statements. This safe harbor is not available for a traditional IPO prospectus, where projections are typically not disclosed, leading some commentators to cite the safe harbor's availability in de-SPAC transactions as an advantage over a traditional IPO. Citing concerns regarding the use of overly optimistic projections in some de-SPAC transactions, the SEC is proposing to eliminate the PSLRA safe harbor in SPAC filings, as well as enhance disclosure requirements for projections that are disclosed, including to identify projections not based on historical data, and provide additional disclosures regarding the preparation and use of projections in connection with de-SPAC transactions.

Other examples of the SEC's effort to align the IPO and de-SPAC rules include proposals to require that the private target company be treated as a co-registrant for purposes of de-SPAC transaction filings; deem underwriters of the SPAC's IPO to be underwriters in connection with the de-SPAC transaction if such underwriters take steps to facilitate the de-SPAC transaction or any related financing transactions (including, as is often the case, acting as a financial advisor or PIPE placement agent); require redetermination of "smaller reporting company" status (which provides qualifying companies reduced disclosure obligations and other accommodations) by the combined company within four business days of closing of the de-SPAC transaction, rather than on an annual basis; and deem all de-SPAC transactions, regardless of their structure, to involve sales of securities to a SPAC's shareholders subject to the Securities Act. Shortly before announcing the proposed rules, the SEC also released guidance that, among other things, clarified that public communications by a de-SPAC target may be deemed a solicitation of the SPAC's shareholders if they promote the transaction or may be reasonably expected to influence the voting decisions of the SPAC's shareholders, subjecting the de-SPAC target to liability of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

In addition to eliminating regulatory gaps between de-SPAC transactions and IPOs, the SEC's proposed rules would add several SPAC-specific disclosure obligations, including detailed disclosures regarding the SPAC's sponsor and its affiliates (including with respect to compensation, agreements with respect to redemption and other potential conflicts of interest), additional disclosures regarding potential dilution, and a statement from the SPAC regarding the fairness of the de-SPAC transaction to unaffiliated security holders. The SEC also suggested that SPACs that have not entered into a definitive agreement for a business combination within 18 months of their IPO or consummated the business combination within 24 months of their IPO may need to register as investment companies under the Investment Company Act of 1940, and proposed a safe harbor from investment company status for SPACs meeting these timeframes and certain other conditions.

The SEC's proposals, which could become effective later in 2022, brought a measure of long-awaited clarity regarding the SEC's plans for SPAC regulation in the years to come. While certain changes would represent only modest incremental burdens, particularly for SPAC market participants that were already diligent in their disclosures and processes, taken together, the proposed rules are likely to further chill a SPAC market that had already cooled significantly by the end of 2021.

SPACs are likely to continue to be a fixture of the M&A landscape in 2022, as the approximately 600 SPACs searching for a target remain highly incentivized to complete a deal before the expiration of the time periods specified in their charters (mostly later in 2022 or in the first half of 2023). Looking beyond the current crop of SPACs, however, heightened regulatory obstacles, as well as the increased litigation risks that may accompany them, are likely to significantly narrow the use of the SPAC as a path to the public markets.

6. Acquisition Financing

Whereas 2020 was a tale of two markets, a frozen first half and a blazing second half, 2021 was a tale of one: booming debt financing markets helped drive a year of robust deal-making activity. Acquirors, whether investment grade, high-yield, or sponsor-backed, and across industries, had strong access to financing commitments with favorable terms, which were followed by permanent financing take-out deals that were often significantly oversubscribed. As central banks begin to taper monetary easing measures taken during the height of COVID-19 pandemic, acquirors will want to closely monitor the impact of these changes on the financing landscape. But so far, even as monetary authorities have begun curtailing their support for the economy, debt markets remain open.

As always, a new year brings its own new challenges and considerations, including the possibility of new COVID-19 variants, and ongoing inflationary pressures. As is always the case, borrowers seeking acquisition financing commitments must remain alert and prepared. Provisions in merger agreements allocating financing failure risk remain an important area of focus. Likewise, it remains critical for corporate acquirors to model downside cases, and to understand the "flex" and other terms that could make a debt commitment ultimately less appealing to them by the time their deal closes. High-grade borrowers may find that traditional financing sources (i.e., capital markets deals and bank loans arranged by major banks) remain their best paths to execution. Leveraged borrowers, on the other hand, may continue to find it useful to consider alternative financing paths and sources, as well, including "direct lenders," to reach a deal.

7. Shareholder Litigation

Shareholder litigation challenging merger and acquisition activity remains common, and—continuing the trend sparked by the Delaware Court of Chancery's 2016 *Trulia* decision curtailing the ability to settle such suits in Delaware—the bulk of these merger-objection suits in recent years have been styled as claims under the federal securities laws and were filed in federal court. Recent reports from NERA and Cornerstone Research show that the number of federal securities class action lawsuits fell in 2021, partly due to a sharp drop in the number of merger objection class action suits filed.[1] However, this drop appears to be due to a shift by stockholders toward filing merger objection suits on an individual basis rather than on behalf of a putative class, potentially to avoid class action filing limitations and disclosure requirements under the PSLRA, and therefore does not necessarily reflect any decline in the number of merger objection suits filed. Another relevant trend in the 2021 class action suit data was a substantial increase in the number of suits filed relating to SPACs.[2]

Merger objection litigation generally challenges disclosures made in connection with M&A activity under Sections 14(a), 14(d), and/or 14(e) of the Exchange Act and sometimes also alleges breaches of state-law fiduciary duties. The overwhelming majority of such federal suits were "mooted" by the issuance of supplemental disclosures and payments of the stockholder plaintiffs' lawyers' fees. Unless the federal courts begin

applying heightened scrutiny to such resolutions akin to Delaware's *Trulia* review of settlements, we expect this litigation activity will continue.

The suits that remain in Delaware are being settled less frequently and litigated more vigorously. As we discuss in Section II.C.1, the Delaware Court of Chancery has continued to expand the circumstances in which a "controlling" stockholder is found to exist in a transaction. This expansion has created opportunities for plaintiffs to avoid dismissal under the *Corwin* doctrine (which allows for pleadings-stage dismissals of certain types of suits based on fully informed stockholder approval of non-controlling stockholder transactions) by alleging that the challenged transaction concerned controlling stockholders. Stockholder appraisal litigation, which allows a stockholder to forego receipt of merger consideration in a transaction and instead seek an award from a Delaware court of the "fair value" of the stockholder's shares, has continued to abate in the wake of several significant decisions from the Delaware Supreme Court emphasizing the importance of the deal price in assessing fair value.[3] Those decisions, coupled with the principle that the appraised value should exclude deal-related synergies, have led to appraisal valuations lower than the deal price in some cases.[4] Although appraisal risk should continue to be considered in the context of each particular transaction, these decisions appear to have discouraged the widespread abuse of appraisal litigation that plagued the M&A market for nearly a decade. The number of appraisal petitions filed in the Delaware Court of Chancery fell from a peak of 76 in 2016 to only six in 2021.

Books and records demands, and litigation related to those demands, have also been the subject of notable recent rulings in the Delaware courts. In *KT4 Partners LLC* v. *Palantir Technologies, Inc.*, the Delaware Supreme Court considered a demand under Section 220 of the Delaware General Corporation Law (the "DGCL") for electronic records, including e-mails, which the Delaware Court of Chancery had denied. Reversing the Delaware Court of Chancery, the Delaware Supreme Court held that the production of e-mail records was required because the company had "a history of not complying with required corporate formalities" and conducted business informally, including over e-mail.[5] The Court nonetheless suggested that companies that "documented [their] actions through board minutes, resolutions, and official letters" would generally be able to satisfy a Section 220 demand using those formal records without the need for an e-mail production.[6] The Delaware Court of Chancery has also recently required the production of unconventional sources of information in addition to board materials, including the communications from board members' personal e-mail addresses and personal devices, in the context of a Special Committee's decision to terminate certain agreements with the company's founder,[7] and the production of a company witness for a deposition on the sources and locations of company books and records other than formal board materials, in the context of a company that refused to provide information on the availability of such additional materials.[8]

The Delaware Court of Chancery's late-2017 ruling in *Lavin* v. *West Corp.* has encouraged greater use of the statutory books and records inspection rights of Section 220 of the DGCL in connection with proposed M&A activity.[9] There, the Court

confirmed that stockholders may use their Section 220 rights to investigate suspected wrongdoing by the board in agreeing to a sale of the company, ruled that such requests are subject to the same stockholder friendly standard that applies in other contexts (any proper purpose reasonably related to the stockholder's interest as a stockholder), and held that fully informed stockholder approval of the transaction will not extinguish a stockholder's right to demand inspection of books and records related to the transaction.

Stockholder activists have also been making greater use of Section 220 books and records demands in their campaigns to scuttle deals, such as Carl Icahn's books and record inspection demand of SandRidge Energy for documents relating to its proposed merger with Bonanza Creek Energy, Inc. However, the Delaware Court of Chancery has articulated limits on the ability of an activist to access corporate books and records to challenge transactions through a proxy contest. In *High River Limited Partnership* v. *Occidental Petroleum Corp.*, Vice Chancellor Slights denied a books and records demand in connection with Icahn's proxy contest against Occidental Petroleum.[10] Icahn sought books and records concerning Occidental Petroleum's decision to purchase Anadarko Petroleum, and its decision to pursue the acquisition rather than to explore a sale.[11] The Court found that Icahn's disagreement with the board's business judgment was not sufficient to infer mismanagement or wrongdoing, and the Court rejected the argument that the records should be provided because they would be material to a proxy contest.[12] The Court concluded that the demanded records were not "essential" to Icahn's purpose of communicating concerns to fellow stockholders, because Icahn already had sufficient public information concerning the challenged transactions to voice his concerns without the need for "a fishing expedition into the boardroom."[13]

C. Activism and Engagement

1. Hedge Fund Activism

a. The Activism Landscape

Recent years have seen continued high levels of raider-like activity by activist hedge funds, both in the U.S. and abroad, often aimed at forcing the adoption of policies with the goal of increasing short-term stock prices, such as increases in share buybacks, the sale or spin-off of one or more businesses of a company, or the sale of the entire company. Approximately 20% of S&P 500 companies have an activist holding greater than 1% of their shareholder base. Activists' assets under management ("AUM") have grown substantially in recent years, with the 50 largest activists ending 2021 with approximately $196 billion in equity assets. Matters of business strategy, operational improvement, capital allocation and structure, CEO succession, M&A, options for monetizing corporate assets, stock buybacks and other economic decisions have also become the subject of shareholder referenda and pressure. Hedge fund activists have also pushed for governance changes as they court proxy advisory services and governance-oriented investors, and have run (or threatened) proxy contests, usually for a short slate of directors, though increasingly for control of the board. Activists have also increasingly targeted top management for removal and replacement by activist-sponsored candidates.

In addition, activists have increasingly worked to block proposed M&A transactions, mostly on the target side but also sometimes on the acquiror side with the goal of either sweetening or scuttling the transaction.

The number of public campaigns in 2021 remained on par with the slower pace of activism activity in 2020, and overall activity remained below average levels seen in recent years prior to the COVID-19 pandemic. A total of 158 companies were targeted by activists via 173 campaigns, a 6% decrease in the number of campaigns compared to the 171 companies targeted in 2020 via 184 campaigns. Activity slowed down following the first quarter of 2021 before picking up during the fourth quarter.

Most campaigns in 2021 ended with announced settlements with activist hedge funds, and only a handful "went the distance" all the way to the annual meeting. Of the 89 board seats won by activists in 2021, only seven were won via a proxy contest, a significantly lower proportion compared to 2017 to 2020, which saw 14% to 35% of board seats won via proxy contest. Compared to previous years, activist nominees in 2021 included a greater portion of diverse candidates and a smaller number of candidates with public company CEO/CFO or board experience.

The number of campaigns launched against European companies decreased in 2021 to 50 campaigns (compared to 57 campaigns in 2020). The United Kingdom accounted for 42% of all activist campaigns in Europe, an increase compared to previous years and driven by leading large-cap activists. In Asia, activist activity held steady with activists continuing to focus their attention mostly on small- and micro-cap companies.

Even activist hedge funds are recognizing that broader stakeholder concerns should take a more prominent role in their activities. Some activist hedge funds are beginning to invoke ESG-related themes in their investments to try to appeal to certain institutional investors. For example, JANA Partners teamed up with CalSTRS on a platform of encouraging Apple to provide more disclosures regarding parental controls and tools for managing use of technology by children, teenagers and young adults. JANA Partners was raising a "social impact" fund, although it announced in June 2019 that it was delaying fundraising efforts. Trillium Asset Management filed a first-of-its-kind proposal at Nike urging the board to improve oversight of workplace sexual harassment and to improve gender diversity and pay disparity, which it ultimately withdrew following a commitment by Nike to evaluate its request and meet quarterly to discuss the results. In June 2020, Jeff Ubben, founder of ValueAct Capital, stepped down from ValueAct and together with several others, formed a new activist fund, Inclusive Capital Partners (ICP), to "partner with management and the boards of companies whose core businesses seek to achieve the reversal of corporate harm" in environmental and societal areas.

A particularly notable development in 2021 is the uptick in ESG-oriented activism. The success of Engine No. 1's proxy contest against ExxonMobil was reflective of a proxy season that saw the number of and support for ESG-related proposals reach new record heights. Among the proposals that passed in 2021 included

proposals calling for the adoption and disclosure of carbon emissions targets, disclosure on progress toward net zero commitments, disclosure of climate-related lobbying activities and reports on board diversity. Continued inflows into ESG investments, coupled with the introduction of universal proxies and ongoing investor focus on ESG issues, notably climate-related transition and physical risks, will likely lead to a continued uptick in ESG activism heading into 2022, with activists leveraging ESG issues to rally the support of key institutional shareholders in favor of broader strategic changes, including M&A. Third Point's campaigns to break up Royal Dutch Shell and Prudential and Elliott Management's efforts to separate SSE are illustrative. In addition, the evolving ESG regulatory landscape could pave the way for activists to push companies that are laggards or that will be negatively affected by anticipated regulatory changes to evaluate strategic alternatives.

SEC Developments: Universal Proxy, Beneficial Ownership and Proxy Advisors. In November 2021, the SEC adopted final rules, applicable to all shareholder meetings held after August 31, 2022, to require parties in a contested election to use universal proxy cards that include all director nominees presented for election at a shareholder meeting. The new rules will permit shareholders to vote by proxy for their preferred combination of board candidates nominated by either the board or the dissident, which previously required shareholders to vote in person at the shareholder meeting. The new rules will also abolish the short slate rule, which permitted dissident shareholders soliciting the support of a partial slate of nominees that would make up a minority of the board to seek authority to vote for some of a registrant's nominees to "round out" its slate. In addition, the new rules will require shareholders presenting a dissident slate of directors to solicit holders of at least 67% of the voting power of share entitled to vote at the shareholder election. While the full impact of the new rules remains to be seen, the introduction of universal proxies and the other rule changes could reduce the cost and complexity of initiating a proxy campaign and may encourage the entry of new activists and other special interest groups to launch activist campaigns.

In late 2021, the SEC also proposed new rules that would reverse changes introduced in 2020 applicable to proxy advisory firms. Specifically, the proposed rules would eliminate the requirement for proxy advisory firms to make their advice available to companies that are subject of their advice at or before the time they make the advice available to their clients. The proposed rules also eliminate the requirement that proxy advisory firms provide their clients the subject company's response. The proposed rules will still require proxy advisory firms to disclose any interests that would be material in assessing the objectivity of their proxy voting advice and any policies and procedures used to identify, and steps taken to address, any material conflicts of interest.

In March 2022, the SEC proposed amendments to Regulation 13D-G to modernize the beneficial ownership reporting rules for public markets. The key proposed changes include: (1) shortening the Schedule 13D filing deadline from 10 days to five days, and setting an amendment deadline of one business day (rather than "promptly") after a material change; (2) shortening the Schedule 13G filing deadlines to five business

days after the end of the month in which the investor crosses the five percent threshold (from 45 days after year-end), or five days after crossing the threshold (from 10 days) for nonexempt passive investors; (3) defining "deemed" beneficial ownership to include reference securities underlying cash-settled derivative securities that are held for the purpose or effect of changing or influencing the control of the issuer of the reference securities; and (4) clarifying the circumstances under which two or more persons have formed a "group" for purposes of Regulation 13D-G to include, among other things, "tipper-tippee" relationships and permitting institutional investor organizations, like The Investor Forum in London, to facilitate shareholder engagement not undertaken with the purpose or effect of changing or influencing control. The proposed amendments represent the most significant reforms to beneficial ownership reporting requirements since the rules were adopted in 1968 and, if adopted, will increase the timeliness and quality of information that all market participants would have.

The SEC has also proposed new Rule 10B-1 which would require any person, or group of persons, who owns a security-based swap position that exceeds the threshold amount set by the rule to promptly file with the SEC a statement containing the information required by Schedule 10B. Schedule 10B would require persons to disclose certain information including the identity of the reporting person and the security-based swap position, as well as the underlying loans or securities and any related loans and securities.

b. M&A Activism

A significant portion of activism has an M&A component, a trend which continued into 2021 when 43% of all activist campaigns featured an M&A-related thesis. There are generally three types of M&A activism: campaigns to sell the target company (which accounted for approximately 28% of M&A activism campaigns in 2021), campaigns aimed at breaking up a target company or having the target company divest a non-core business line (which accounted for approximately 28% of M&A activism campaigns in 2021) and campaigns that attempt to scuttle or improve an existing deal (which accounted for approximately 44% of M&A activism campaigns in 2021). The past year saw an uptick in activist efforts to scuttle or sweeten deals, with activists finding greater success in improving the terms of a transaction rather than scuttling it altogether. Examples of buy-side activism in the past year, including TCI's campaign against Canadian National Railway's proposed acquisition of Kansas City Southern, Jana Partners' campaign against Zendesk's proposed acquisition of Momentive and Land and Buildings' campaign against Hilton Grand Vacation's acquisition of Diamond Resorts, illustrate that M&A activism need not be limited to target shareholders agitating for a higher price. Even traditional non-activist institutional investors may decide to enter the fray in certain circumstances, as exemplified by Wellington Management's objections to the Bristol-Myers Squibb/Celgene transaction and T. Rowe Price's objections to Occidental's acquisition of Anadarko Petroleum. In some cases, activist funds, such as Elliott Management, have offered to serve as financing sources to help "get the deal done" or have become bidders themselves for all or part of a company, blurring the line between hedge fund activism and assertive private equity.

c. Tactics

Activists have also become more sophisticated, hiring investment bankers and other seasoned advisors to draft "white papers," aggressively using social media and other public relations techniques, consulting behind the scenes with traditional long-only investment managers and institutional shareholders, nominating director candidates with executive and industry expertise, invoking statutory rights to obtain a company's nonpublic "books and records" for use in a proxy fight, deploying precatory shareholder proposals, and being willing to exploit vulnerabilities by using special meeting rights and acting by written consent. Special economic arrangements among hedge funds continue to appear from time to time, as have so-called "golden-leash" arrangements between activists and their director nominees, whereby the activist agrees to pay a director nominee for the nominee's service on, or candidacy for, the board. Many companies have developed measures to reveal these arrangements through carefully drafted bylaw provisions that address undisclosed voting commitments and compensation arrangements between activist funds and their director nominees. And activists continue to use the statutory books and records inspection rights of Section 220 of the DGCL to aid challenges to M&A activity.

2. Governance Landscape

Companies face a rapidly evolving corporate governance landscape defined by heightened scrutiny of a company's articulation of long-term strategies, board composition and overall governance *bona fides*.

The growing acceptance of a stakeholder-centric corporate governance model, as exemplified by Martin Lipton's articulation of the New Paradigm,[14] is a key development in the governance landscape. This approach reimagines corporate governance as a cooperative exercise among a corporation's shareholders, directors, managers, employees, business partners, and the communities in which the corporation operates. The emerging view of a new paradigm for corporate governance recognizes the deleterious effects of short-termism and emphasizes a focus on building strong corporate relationships and practices to create sustainable, long-term economic prosperity. In 2019, each of the major index fund managers, the Business Roundtable, the British Academy, the UK Financial Reporting Council, the World Economic Forum and a number of other organizations (both governmental and nongovernmental) announced positions that toned down, or in some cases rejected, shareholder primacy as a corporate governance paradigm and took steps to show support of sustainable long-term investment and ESG considerations. In a move that received significant attention across the governance community and the mainstream press, the Business Roundtable in 2019 adopted a statement on the purpose of a corporation that embraced stakeholder corporate governance and articulated the 181 CEO signatories' "fundamental commitment" to deliver value to all stakeholders, including customers, employees, suppliers, the community and shareholders.

Spurring the emergence of the New Paradigm is that index-based and other "passive" funds, with their longer time horizons for investing in particular companies, continued to grow in size and importance into 2021. Of the $13.5 trillion in AUM by investors in publicly traded equities in the U.S., the value of passive funds have already surpassed that of actively managed funds, a sea change from two decades earlier when passively held assets represented only 6% of a much smaller AUM pool. Over the course of 2021, over $346 billion flowed into U.S. passively managed equity funds while actively managed funds saw $195 billion of outflows during the same period. Many of the companies that constitute the S&P 500 now have Vanguard, BlackRock and State Street in the "top five" of their shareholder register, with the broader ownership base being primarily institutional. These changes underscore the importance of ongoing shareholder engagement and index fund support and the risks companies face if they take such support for granted.

Until fairly recently, ESG-related proxy proposals rarely received significant shareholder support or attention. However, 2021 saw both a record number of ESG proposals and unprecedented levels of shareholder support for proposals that went to a vote. New guidance released by the SEC last year narrowing the scope of no-action exclusions with respect to Rule 14a-8 proposals may make it more difficult for issuers going forward to seek exclusion of ESG proposals.

Companies, including boards, are increasingly expected to integrate relevant sustainability and ESG matters into strategic and operational planning and communicate on these subjects effectively. Disclosing material ESG performance, corporate responsibility initiatives and progress publicly on the company's website and bringing them to the attention of investors who prioritize these issues have become increasingly significant actions requiring attention of both management and the board. The relationship between ESG goals and incentive compensation has also become more salient as environmental and social goals are recognized as integral to long-term value creation and increasingly integrated into executive compensation arrangements, although major institutional investors have cautioned against use of ESG targets that are not "stretch" goals for the company.

The discussion below sets forth recent trends relating to certain key governance matters.

Shareholder Proposals. In September 2020, the SEC announced amendments to the eligibility requirements for shareholders to have a non-binding proposal included in an issuer's proxy materials under Rule 14a-8. These rules were the first amendments to the eligibility criteria in more than twenty years. In particular, the new rules created a tiered approach to the ownership requirements that a shareholder must meet in order to submit a proposal pursuant to Rule 14a-8. Proponents are now required to hold $2,000 of the issuer's securities for three years, $15,000 for two years, or $25,000 for one year. Previously, a proponent only had to hold $2,000, or 1%, of the issuer's securities for a period of one year. Additionally, the new rules also address the necessary level of support for resubmitting proposals. Previously, a proposal could be excluded from the

issuer's proxy materials if it addresses substantially the same subject matter as a proposal previously included in the issuer's proxy materials, the most recent vote on the matter occurred within the preceding three calendar years, and in that most recent vote received less than a specified percentage of the votes: 3% if voted on once within the preceding five calendar years, 6% if voted on twice in such period, and 10% if voted on three or more times in such period. The amendments have raised these thresholds to 5%, 15% and 25%, respectively. The amendments are applicable for all shareholder meetings to be held on or after January 1, 2022, although transition rules will permit a shareholder that has held $2,000 of an issuer's securities for one year as of the effective date of the amendments, and continuously maintains ownership of at least $2,000 of the issuer's securities, to qualify to submit a proposal for meetings to be held before January 1, 2023. Given that a large number of proposals made pursuant to Rule 14a-8 come from a handful of shareholders, it remains to be seen if the change to the ownership requirements will decrease the number of such proposals going forward. However, given the modest thresholds, it is unlikely that the amendments will prevent the submission or success of meritorious proposals.

Proxy Access. Efforts by shareholders to expand their ability to nominate their own director candidates using the company's own proxy statement and proxy card rather than using their own proxy materials continued into the 2021 proxy season, and approximately 739 public companies have implemented proxy access. Proxy access frequently utilizes a "3/3/20/20" formulation requiring eligible shareholders to have continuously owned at least 3% of the company's outstanding stock for at least three years, limiting the maximum number of proxy access nominees to 20% of the board with appropriate crediting of previously elected nominees and permitting reasonable levels of aggregation and grouping (*e.g.*, up to 20 shareholders) to meet the 3% threshold; treatment of other terms varies by company.

Structural Provisions. Shareholder proposals requesting companies to repeal staggered boards continue to be popular, and such proposals have passed 88.6% of the time since 2005 at S&P 500 companies. At year-end 2021, approximately 13.0% of S&P 500 companies had a staggered board, according to FactSet figures, down from 47% as of 2005. Staggered boards are more prevalent among smaller companies, with 25.3% of the companies in the S&P 1500 having a staggered board at the end of 2021. As distinct from rights plans, a company that gives up its staggered board cannot regain a staggered board when a takeover threat materializes because it cannot be adopted unilaterally without shareholder approval, which would be difficult to obtain.

While many large companies have shareholder rights plans (also known as a "poison pill") "on-the-shelf" ready to be adopted promptly following a specific takeover threat, these companies rarely have standing rights plans in place. According to FactSet, at year-end 2021, only 1.3% of S&P 500 companies had a shareholder rights plan in effect, down from approximately 45% at the end of 2005. Importantly, unlike a staggered board, a company can adopt a rights plan quickly if a hostile or unsolicited activist situation develops. However, as discussed further in Section VI.A, companies

should be aware of ISS proxy voting policy guidelines regarding recommendations with respect to directors of companies that adopt rights plans. In the wake of the COVID-19 pandemic and the possibility of activists building a large stake rapidly and under the disclosure radar, a handful of companies, especially those whose market capitalization have dropped below $1 billion, implemented shareholder rights plans and a number of others kept rights plans "on the shelf and ready to go." Additionally, governance advisors focus on charter and bylaw provisions adopted by newly public companies and shareholder activists have pressured companies to remove, or agree not to include, several anti-takeover defenses in spin-off companies' governance documents. Select public companies in the U.S. also considered adopting net operating loss carryforwards ("NOL") rights plans to preserve tax assets amid market fluctuations caused by the COVID-19 pandemic. NOL rights plans are discussed below in Section VI.A.

Action by Written Consent. Governance activists have been seeking to increase the number of companies that may be subject to consent solicitations. At the end of 2021, approximately 68.2% of S&P 500 companies prohibit shareholder action by written consent. During 2005-2009, only one Rule 14a-8 shareholder proposal was reported to have sought to allow or ease the ability of shareholders to act by written consent. From 2017 to 2021, however, there were 122 such proposals (approximately 23% of which passed). Hostile bidders and activist hedge funds have effectively used the written consent method to facilitate their campaigns, and companies with provisions permitting written consent should carefully consider what safeguards on the written consent process they can legally put in place without triggering shareholder backlash.

Special Meetings. Institutional shareholders have also been pushing for the right of shareholders to call special meetings in between annual meetings, and shareholder proposals seeking such a right can generally be expected to receive significant support, depending on the specific threshold proposed by the shareholder and the company's governance profile. As of the end of 2021, over 66% of S&P 500 companies permit shareholders to call special meetings in between annual meetings. Care should be taken in drafting charter or bylaw provisions relating to special meeting rights to ensure that protections are in place to minimize abuse while avoiding subjecting institutional shareholders who wish to support the call of a special meeting to onerous procedural requirements. Companies should also be thoughtful in deciding how to respond to shareholder proposals seeking to reduce existing meeting thresholds, including whether or not to seek exclusion of the proposal.

Independent Board Chair. For the past several years, shareholder proposals to create an independent Chairman by separating the CEO and Chairman positions have been one of the most frequent governance-related shareholder proposals. As of the end of 2021, 37% of S&P 500 companies had an independent Chairman. Although only 4.3% of these shareholder proposals have passed since 2005 and only three such proposals have passed since 2016, we expect that these shareholder proposals will continue to be made with regularity.

Right to Participate in Virtual Annual Meetings. As a result of lockdown restrictions imposed due to the COVID-19 pandemic, most companies resorted to conducting their annual meetings using a virtual-only or hybrid format, with 65% of shareholder meetings being in such a format. While virtual or hybrid annual meetings generally increase shareholder attendance and participation, activists and dissidents (including in the context of contested virtual meetings) have voiced concerns about the inability to participate substantively, whether by voicing opinions or asking questions, as they would in a physical annual meeting. April 2020 saw the first-ever virtual contested annual meeting when shareholders of TEGNA Inc. participated in such a meeting (all of the company's twelve nominees were reelected). It remains to be seen whether contested virtual meetings will be a mainstay in the aftermath of the COVID-19 crisis.

In March 2022, the SEC also released new proposed rules to require registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements. The proposed climate-related rules, if adopted, will require issuers to, among other things, make public disclosures on board and management oversight and governance of climate-related risks and also require line item disclosures of climate-related expenditures in audited financial statements that would come under the purview of the company's internal controls over financial reporting. In addition, the SEC has also released new proposed rules on cybersecurity disclosures that would require, among other things, disclosure of cybersecurity expertise on the board, if any.

3. Debt Activism and Net Short Debt Investors

"Debt default activism," whereby funds purchase debt on the theory that a borrower is already in default, and then actively seek to enforce that default in a manner by which they stand to profit, remains an area deserving of borrower focus. When debt prices decline, default activists can more easily buy debt at a discount and then seek to profit by demanding the debt be repaid (in some cases with premium) as a result of an alleged default. Market volatility also drives expansion of the credit default swap ("CDS") market, which can create substantial opportunities for a default activist. CDS contracts pay off when the underlying borrower defaults on its debt. While CDSs can serve important *bona fide* hedging purposes, a default activist can buy CDSs, assert the occurrence of a default (often on the grounds of a complicated and years-old transaction), and seek to profit from the resulting chaos such assertion creates. This "net short" strategy was made famous in the 2019 *Windstream* matter, in which telecommunications provider Windstream lost its much-watched litigation with the hedge fund Aurelius Capital—which was widely believed to be "net-short" Windstream's debt—and subsequently entered bankruptcy.

Since *Windstream*, borrowers entering into new debt agreements have frequently sought to preempt the threat of debt default activism by including provisions that undermine key activist strategies, including net-short strategies. And though such

provisions are helpful, they do not convey full immunity to the threat they address. Companies with debt trading below par should stay particularly alert to the threat of default activism, especially when they are weighing covenant-implicating transactions. It is no longer sufficient for borrowers to consider only the "four corners" of a debt document when analyzing whether a transaction is permitted by its covenants, as activists have increasingly sought to meld arguments of breach-in-form with allegations of breach-in-substance. Obviously, major corporate transactions cannot simply be put on hold for fear of a spurious challenge. But before completing a transaction, it is worth assessing what arguments a creative activist could make against it. In many cases, there are proactive process and documentation steps that a borrower can take that will blunt the risk of such future arguments.

D. Antitrust Trends

One of the most significant areas of development in M&A in 2021 was in antitrust, and the effects of this year's developments will likely factor into dealmakers' decisionmaking for years to come. New leadership appointed by the Biden administration at the FTC (including the appointment of Lina Khan as chair of the agency in June 2021) and the DOJ (including the appointment of Jonathan Kanter as the top official at the DOJ's Antitrust Division in November) have ushered in a new, more aggressive and unpredictable era of merger enforcement. As new leadership attempts to make their mark on the U.S. antitrust environment, parties should expect continued aggressive enforcement in the years ahead.

The federal agencies, in particular the FTC, have not shied away from updating policy priorities and changing existing practices. Procedural policy changes (some adopted by a divided FTC split along partisan lines) include (i) the "temporary" suspension of early termination of the initial waiting period for HSR filings, which was announced in February 2021 and remains in place with no indication of when or if the suspension will be lifted, (ii) the FTC's new practice of sending standard form pre-consummation warning letters to merging parties alerting them that, notwithstanding the expiration of the statutory waiting period, the FTC's investigation remains open, the agency may subsequently determine that the deal was unlawful, and companies that choose to proceed with transactions that have not been fully investigated are doing so "at their own risk," and (iii) the FTC's adoption of a policy requiring acquirors who settle merger enforcement actions to obtain prior approval from the FTC before closing transactions in the same or related relevant markets for a period of at least ten years. Substantive policy changes include the FTC's new "holistic" approach that focuses on harms that "Americans are facing in their daily lives," which now may consider novel issues beyond the traditional focus on anticompetitive effects (such as unions, wages, sustainability and diversity), potentially shifting existing antitrust doctrine away from the consumer welfare standard, as well as the FTC's repeal of the 2020 vertical merger guidelines with the intent to adopt guidelines that better reflect "the skepticism the law demands." The FTC and the DOJ announced the launch of a joint public inquiry to solicit input on ways to modernize their horizontal and vertical merger guidelines "to better detect and prevent illegal, anticompetitive deals in today's modern markets," an

effort that the agencies hope to complete this year. These changes, among others, have complicated dealmaking by introducing greater uncertainty for merging parties, increasing unpredictability and the regulatory burden in the context of specific transactions as well as for future transactions companies may wish to pursue, and creating longer review periods.

Amidst robust M&A activity in 2021, the FTC and the DOJ have investigated and challenged transactions in an array of industries. High-profile enforcement actions included the DOJ's challenge of Visa's $5.3 billion acquisition of Plaid, which involved allegations that Plaid was "developing a payments platform that would challenge Visa's monopoly" in online debit payments, and therefore the acquisition would "kill" a nascent competitor, and which the parties abandoned in early 2021, shortly after the DOJ's challenge; the DOJ's successful challenge to the $30 billion megadeal between insurance brokers Aon plc and Willis Towers Watson, which the parties abandoned in July 2021 after being unable to reach a settlement with the DOJ; the FTC's challenge against NVIDIA's $40 billion acquisition of Arm as a vertical merger, which caused the parties to terminate the deal; the FTC's pending challenge against Illumina's $8 billion acquisition of Grail—another vertical deal that is also under review in Europe; the DOJ's recent challenge to Penguin Random House's $2.2 billion purchase of competitor Simon & Schuster, a deal that would combine two of the top five publishing companies in the U.S., and notably focuses on harm to authors (monopsony) rather than consumers (monopoly); and the FTC's lawsuit to block Lockheed Martin's $4.4 billion acquisition of Aerojet, which caused the parties to terminate the deal.

All indications point to an even more active enforcement environment in 2022. In particular, the agencies will continue to investigate and aggressively pursue vertical mergers and so-called "killer" acquisitions, in addition to traditional horizontal mergers. The DOJ may be increasingly active in shaking up previous policies as Jonathan Kanter settles into his new role. Additionally, leaders of the FTC and the DOJ have expressed a commitment to working together to progress their priorities, making it likely that interagency coordination will increase in the year ahead. Finally, enhanced collaboration between U.S. regulatory agencies and their international counterparts, especially in industries such as technology, will create a tougher environment for competition enforcement.

Further complicating the regulatory landscape is the possibility that Congress will overhaul the current legislative framework in the near future. Various proposals pending in Congress range from burden shifting, outright bans on mergers involving companies over a certain size, modification of the standards used to evaluate mergers, and increased penalties for antitrust violations. For example, a bill recently introduced in Congress by Senator Elizabeth Warren would make all deals valued over $5 billion illegal. State antitrust regimes may also be amended in the near future, exemplified by a sweeping antitrust bill recently reintroduced in the New York State legislature. While there is broad bipartisan commitment to altering the current antitrust regime, it remains unclear whether any of the pending antitrust bills have the requisite Congressional support.

We expect that regulatory headwinds will impact levels of M&A activity in 2022, both by strategic acquirors and, less so, by private equity firms (which historically have faced relatively more lenient antitrust review) as Biden administration officials continue working to implement the Administration's aggressive antitrust agenda. One way parties will account for the uncertainty is through deal mechanics – including detailed regulatory commitments, more frequent and larger reverse termination fees, longer outside dates, and potentially changes to the interim operating covenants that restrict the seller's conduct of its business in the pre-closing period. The uncertainty and general environment of hostility underscore the importance of careful and early planning in consultation with legal and financial advisors, as well as proactive engagement with the agencies if issues may arise.

II.

Board Considerations in M&A

The basic duties of corporate directors are to act with care and loyalty. But the level of scrutiny with which courts will review directors' compliance with their duties varies with situation and context. The default rule is the business judgment rule, which holds generally that when directors act with due care and without personal conflict of interest, the business results—even materially negative results—of their decision-making will not be considered a breach of their fiduciary duties. However, certain contexts, including when directors defend against a threatened change to corporate control or policy or engage in a sale of control of a company, invoke a heightened level of scrutiny. Finally, in transactions involving a conflict of interest, an even more exacting "entire fairness" standard may apply.

A. Directors' Duties

Directors owe two fundamental duties to stockholders: the duty of care and the duty of loyalty. Directors satisfy their duty of care by acting on a reasonably informed basis. Directors satisfy their duty of loyalty by acting in good faith and in the best interests of the stockholders and the corporation, rather than in their own interests or in bad faith.

1. Duty of Care

At its core, the duty of care may be characterized as the directors' obligation to act on an informed basis after due consideration of relevant information and appropriate deliberation. Due care means that directors should act to assure themselves that they have the information required to take, or refrain from taking, action; that they devote sufficient time to the consideration of such information; and that they obtain, where useful, advice from counsel, financial advisors, and other appropriate experts.

Directors who act without adequate information, or who do not adequately supervise a merger sales process, risk criticism from the courts. Regardless of whether a transaction is a "change-of-control," directors should take an active role in the decision-making process and remain fully informed throughout that process.[15]

Because a central inquiry in a duty of care case is whether the board acted on an informed basis, a board should carefully document the basis for its decisions. While the use of competent advisors will generally protect directors from potential liability and help a board demonstrate that its decisions should not be set aside by the courts, ultimately business decisions must be made by directors—they cannot be delegated to advisors.[16]

Exercise of the duty of care is not a solitary act, however. In addition to conferring with fellow directors, directors are permitted by Delaware statutory law to rely on advice from experts, such as financial and legal advisors, as to matters the director

reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.[17]

Delaware law is protective of directors who endeavor in good faith to fulfill their duty of care. To demonstrate that the directors have breached their duty of care, the plaintiff bears the burden of proof, and must prove that director conduct constitutes "gross negligence," measured under the standard announced in 1985 by the Delaware Supreme Court in *Smith* v. *Van Gorkom*.[18] Since *Van Gorkom*, the Delaware courts have been careful to employ a genuine gross negligence standard before imposing due care liability, and that reality, plus the ubiquity of exculpatory charter provisions, which we next discuss, has meant that independent directors have faced virtually no monetary judgments for due care liability.

In addition, Section 102(b)(7) of the Delaware General Corporation Law ("DGCL") allows corporations to include in their certificates of incorporation a provision to exculpate directors (but not officers) from monetary liability for breaches of the duty of care. Section 102(b)(7) provisions cannot, however, exculpate breaches of the duty of loyalty (including breaches arising from bad faith conduct), and they do not prevent a court from ordering equitable relief against violations of any duty.[19] Perhaps more important, the question of whether independent directors have acted with due care has often influenced cases involving the possible liability of interested parties because, for example, the failure of independent directors on a special committee to act as an adequate proxy for arms-length bargaining can result in a finding that a transaction was not entirely fair and subject the interested party to damages. Furthermore, even an exculpated breach of the duty of care can form the basis of a claim against a non-exculpated party (a financial advisor or officer, for example) for aiding and abetting the breach. Claims against allegedly conflicted financial advisors are discussed below in Section III.D.

2. Duty of Loyalty

Directors have a duty to act in a manner they believe to be in the best interests of the corporation and its stockholders. This includes a duty *not* to act in a manner adverse to those interests by putting a personal interest or the interests of someone to whom the director is beholden ahead of the corporation's or the stockholders' interests. A classic example of a breach of the duty of loyalty is a director engaging in a "self-dealing" transaction. However, any time a majority of directors are either (a) personally interested in a decision before the board or (b) not independent from or otherwise dominated by someone who is interested, courts will be concerned about a potential violation of the duty of loyalty and may review the corporate action under the "entire fairness" level of scrutiny, described more fully below.[20] Another such example is the corporate opportunity doctrine, which is ancillary to the duty of loyalty, that generally prohibits directors from appropriating for themselves certain opportunities in which the corporation has some interest or expectancy.[21]

The duty of loyalty also encompasses the concept of good faith. In its 2006 decision in *Stone* v. *Ritter*, the Delaware Supreme Court clarified that "the obligation to

act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty."[22] Instead, the traditional duty of loyalty "encompasses cases where the fiduciary fails to act in good faith."[23] Directors violate their good faith obligations where such directors "intentionally act[] with a purpose other than that of advancing the best interests of the corporation, where [such directors] act[] with the intent to violate applicable positive law, or where [such directors] intentionally fail[] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties."[24] Bad faith (which Delaware courts have held to be synonymous with an absence of good faith)[25] thus requires an inquiry into whether "directors utterly failed to attempt" to comply with their responsibilities, rather than merely "questioning whether disinterested, independent directors did everything that they (arguably) should have done."[26]

Understanding what constitutes a violation of the duty of loyalty is especially important because corporations may not exculpate their directors for breaches of the duty of loyalty (in contrast to breaches of the duty of care) under Section 102(b)(7). The Delaware Supreme Court has held that if a plaintiff has failed to plead a duty of loyalty claim against a director, that director may be dismissed from the litigation, even where the plaintiff may have adequately pleaded loyalty claims against other members of the board.[27]

B. The Standards of Review

The fiduciary duties of care and loyalty are standards of conduct describing a director's obligations to the corporation.[28] Whether a court determines that directors breached their fiduciary duties can depend heavily on the standard of review the court applies to the directors' decision-making.

1. Business Judgment Rule

The traditional business judgment rule is the default standard of review applicable to directors' decisions. Under the business judgment rule, the court will defer to, and not second guess, decisions made by directors who have fulfilled their duties of care and loyalty. The purpose of the rule is to "encourage[] corporate fiduciaries to attempt to increase stockholder wealth by engaging in those risks that, in their business judgment, are in the best interest of the corporation 'without the debilitating fear that they will be held personally liable if the company experiences losses.'"[29] In the case of a Delaware corporation, the statutory basis for the business judgment rule is Section 141(a) of the DGCL, which provides that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."[30]

In cases where the business judgment rule applies, directors' decisions are protected unless a plaintiff is able to prove that a board has in fact acted disloyally, in bad faith, or with gross negligence.[31] This rule prevents courts and stockholders from interfering with managerial decisions made by a loyal and informed board unless the decisions cannot be "attributed to any rational business purpose."[32] Indeed, the Delaware

Court of Chancery has described business judgment review as a "bare rationality test."[33] If a plaintiff is able to rebut the presumptive protections of the business judgment rule, the court will review the action under the more exacting standard of entire fairness.[34]

2. Enhanced or Intermediate Scrutiny

There are certain situations in which Delaware courts will not defer to board decisions under the traditional business judgment rule. These include a board's (a) approval of transactions involving a sale of control[35] and (b) adoption of defensive mechanisms in response to an alleged threat to corporate control or policy.[36]

In these circumstances, board action is subject to judicial review under an "enhanced scrutiny" standard, which examines the substantive reasonableness of both the board's process and its action. The Delaware Court of Chancery has explained that "[e]nhanced scrutiny applies when the realities of the decision-making context can subtly undermine the decisions of even independent and disinterested directors."[37] The decision-making process, including the information relied on, must satisfy the court's enhanced, or intermediate, standard. In addition, under the enhanced scrutiny test, unlike under the traditional business judgment rule, the court will need to be satisfied that the directors' decisions were objectively *reasonable* rather than merely rational.[38] It is important to note that these tests have greatest utility before (as compared to after) a stockholder vote and when a third-party bidder or other plaintiff is seeking injunctive relief.[39] As discussed further below in Section II.D, when a board decision that would otherwise be subject to enhanced scrutiny under *Revlon* is approved via a fully informed, uncoerced vote of a majority of the disinterested stockholders, the standard of review shifts to business judgment.[40]

a. *Revlon*

Transactions involving a "sale of control" or "change of control" of a corporation (*i.e.*, a merger in which all or a preponderant percentage of the consideration paid to the corporation's stockholders is cash, or a merger that results in a corporation having a controlling stockholder) are subject to enhanced judicial review.[41] In *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court held that in a sale of control context, directors must attempt to achieve the highest value reasonably available for stockholders.[42] Under this conception of *Revlon*, provided a board is choosing between two or more capable bidders presenting transactions that are comparable in terms of timing and likelihood of consummation, it must look solely to price. Specifically, a board comparing two or more cash offers cannot, for example, choose the lower one because it has advantages for "constituencies" other than common stockholders, such as employees, customers, management, and preferred stockholders.

However, it is also true that "there is no single blueprint that a board must follow to fulfill its duties" in the *Revlon* context.[43] The Delaware Supreme Court has held that "[i]f a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may

have cast doubt on the board's determination."[44] This flexibility is particularly significant in determining a board's *Revlon* obligations when it is considering a friendly merger for cash but does not wish to engage in pre-signing negotiations with more than one partner. The Court has recently stressed that "[w]hen a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal," the board's *Revlon* obligations are likely met.[45]

1. When Does *Revlon* Apply?

The *Revlon* "duty to seek the best available price applies only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control."[46] The most common example of this is where the board of a non-controlled company decides to enter into a definitive agreement to sell the company in an all-cash deal. But, where the board does not embark on a change-of-control transaction, such as when it is arguably put "in play" by the actions of outsiders,[47] *Revlon* review will not apply. Accordingly, enhanced scrutiny is not triggered by a board's refusal to engage in negotiations where an offeror invites discussion of a friendly (or unfriendly) deal.[48] Nor does *Revlon* obligate a company that has embarked on a sale process to complete a sale process, even if the offers received are at a substantial premium to the company's current trading value. In addition, the Delaware Supreme Court held in its seminal 1989 opinion in *Time Warner* that *Revlon* will not apply to a merger transaction in which there is no change-of-control, such as in a purely stock-for-stock merger between two non-controlled companies. Rather, the ordinary business judgment rule applies to the decision of a board to enter into a merger agreement under those circumstances.[49] But, the Delaware Supreme Court later clarified in its decision in *Paramount Communications, Inc.* v. *QVC Network Inc.*, a stock-for-stock merger is considered to involve a sale of control when a corporation that has no controlling stockholder pre-merger would have a controlling stockholder post-merger.[50] The reason that pure stock-for-stock mergers between non-controlled entities do not result in a *Revlon*-inducing "change-of-control" is that such combinations simply shift "control" of the seller from one dispersed generality of public stockholders to a differently constituted group that still has no controlling stockholder. Accordingly, the future prospect of a potential sale of control at a premium is preserved for the selling company's stockholders. This principle applies even if the acquired company in an all-stock merger is very small in relation to the buyer. Despite the formal difference between the standards of review applicable to stock-for-stock transactions, the Delaware courts have indicated that the doctrinal distinction is not absolute, and, even in all-stock transactions, directors are accordingly well advised to consider alternatives for maximizing stockholder value and to take care that the record reflects such consideration.[51]

In addition, the *Time-Warner* decision makes clear that so long as the initial merger agreement did not itself involve a change-of-control transaction, the appearance of an unsolicited second bid (whether cash or stock) does not in and of itself impose *Revlon* duties on the target board. Rather, the seller in a strategic stock-for-stock deal, as

a matter of law, is free to continue to pursue the original proposed merger, assuming it has satisfied the applicable standard. As the Court said, "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."[52] In other words, a *Revlon* situation cannot be unwillingly forced upon a board that has not itself elected to engage in a change-of-control transaction. Absent the circumstances defined in *Revlon* and its progeny, a board is not obligated to choose short-term over long-term value and, likewise, "is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover."[53] Thus, even if an unsolicited bid provides greater short-term value than a stock-for-stock merger, the target's board may attempt to preserve or achieve for its shareholders the business benefits of the original merger transaction so long as the original merger does not itself constitute a change of control. However, as discussed below in Section II.B.2.b, *Unocal* review may apply to a board's defensive measures in the face of a competing bid, even when neither bid is subject to *Revlon* review.

Typically, Delaware courts have found no "change-of-control" triggering *Revlon* in the cash (or stock) sale of a company with a controlling shareholder to a third party.[54] Where a company already has a controlling shareholder, "control" is not an asset owned by the minority shareholders and, thus, they are not entitled to a control premium. In *In re Synthes*, the Delaware Court of Chancery expressly held, therefore, that the sale of controlled companies does not invoke *Revlon* review.[55] This rule was recently questioned, however, in a decision that concluded that *Revlon* should be the applicable standard of review if the transaction could not be cleansed under the *Corwin* doctrine, discussed below.[56]

Although it is clear that all-cash deals invoke *Revlon* review and all-stock deals do not, the standard is less clear with regard to situations in which the consideration is mixed. In *In re Santa Fe Pacific Corp.*, the Delaware Supreme Court held that a transaction in which cash represented 33% of the consideration would not be subjected to *Revlon* review.[57] But the Delaware Court of Chancery has ruled that the *Revlon* standard would likely apply to half-cash, half-stock mergers, reasoning that enhanced judicial scrutiny was in order because a significant portion "of the stockholders' investment . . . will be converted to cash and thereby be deprived of its long-run potential."[58]

Revlon applies only once the board actually makes the decision to embark on a change-of-control transaction and not while it is exploring whether or not to do so.[59] Accordingly, the board may change its mind at any time before making the decision to enter into a transaction. However, once a board makes a decision that attracts the heightened *Revlon* level of scrutiny, courts may look back at the board's behavior during the exploration process and may be critical of actions taken that appear unreasonable and inconsistent with the board's duty to maximize stockholder value.[60] For this reason, it is important for boards and their advisors to keep a good record of their reasons for taking the actions they did.

2. What Constitutes Value Maximization?

Revlon does not require boards to simply accept the highest nominal offer for a company. A board may conclude that even a cash offer, although "higher" in terms of price than another cash offer, is substantially less likely to be consummated; the risk of non-consummation is directly related to value. Directors "should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives."[61] In the context of two all-cash bids, under certain circumstances a board may choose to take a bid that is "fully financed, fully investigated and able to close" promptly over a nominally higher, yet more uncertain, competing offer.[62] Bids that present serious issues concerning regulatory approval or the buyer's ability to close may be viewed as less attractive, although nominally higher, than offers that are more certain of consummation.

An example of judicial deference to a board's strategic decisions when conducting a sale of control is *In re Dollar Thrifty Shareholder Litigation*,[63] where the Delaware Court of Chancery denied a motion to enjoin the completion of Dollar Thrifty's merger with Hertz, finding that the Dollar Thrifty board had not violated its duties in declining a higher bid made post-signing, because the directors concluded that the new bidder lacked the resources to finance the deal, and that the deal was subject to greater antitrust risk.[64] The Court wrote that "directors are generally free to select the path to value maximization [under *Revlon*], so long as they choose a reasonable route to get there."[65] Similarly, the Delaware Court of Chancery refused to enjoin a stockholder vote on a proposed merger between Family Dollar Stores, Inc. and Dollar Tree Stores, Inc. when the Family Dollar board turned down a facially higher bid from Dollar General, Inc.[66] The Court held that the independent directors properly complied with their fiduciary duties and were justified in concluding that "a financially superior offer on paper does not equate to a financially superior transaction in the real world if there is a meaningful risk that the transaction will not close for antitrust reasons."[67]

3. What Sort of Sale Process Is Necessary?

Boards have substantial latitude to decide what tactics will result in the best price. As the Delaware Supreme Court recently reaffirmed, "*Revlon* and its progeny do not set out a specific route that a board must follow when fulfilling its fiduciary duties, and an independent board is entitled to use its business judgment to decide to enter into a strategic transaction that promises great benefit, even when it creates certain risks."[68] *Revlon* does not "demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest."[69] Courts have recognized that, in general, disinterested board decisions as to how to manage a sale process are protected by the business judgment rule. In *Mills Acquisition Co.* v. *Macmillan, Inc.*, the Delaware Supreme Court stated that "[i]n the absence of self-interest . . . the actions of an independent board of directors in designing and conducting a corporate auction are protected by the business judgment rule."[70] A board approving any sale of control must also be informed concerning the development of the transaction, alternatives, valuation

issues and all material terms of the merger agreement. Thus, even in the change-of-control context reviewed under *Revlon*'s enhanced scrutiny, a board retains a good deal of authority to determine how to obtain the best value reasonably available to shareholders.

The Delaware Court of Chancery's decision in *In re Toys "R" Us, Inc. Shareholder Litigation*, illustrates that well-advised boards have wide latitude in structuring sale processes.[71] The Court's noteworthy holdings included, among others: (1) rejection of the plaintiffs' claims that a 3.75% break-up fee and matching rights unreasonably deterred additional bids; (2) approval of the board's decision to permit two of the competing private equity firms in the deal to "club" together, which potentially reduced the number of competing bidders in later rounds but was designed to facilitate bidding; (3) the rejection of allegations of a conflict of interest on the part of the CEO arising out of his stock and option holdings; and (4) the rejection of claims that the board's financial advisor's advice was tainted by the terms of its engagement letter, which provided for greater fees in the event of a sale of the whole company versus some smaller transaction. The opinion reaffirmed the principle that courts will not second-guess well-informed, good faith decisions that need to be made to bring a sale process to successful conclusion.

A board is permitted to forego a pre-signing market check if the merger agreement permits the emergence of a higher bid after signing and contains reasonable deal protection measures.[72] The Delaware Court of Chancery has explained that "there is no bright-line rule that directors must conduct a pre-agreement market check or shop the company," and "as long as the Board retained significant flexibility to deal with any later-emerging bidder and ensured that the market would have a healthy period of time to digest the proposed transaction, and no other bidder emerged, the Board could be assured that it had obtained the best transaction reasonably attainable."[73] Similarly, the Delaware Supreme Court has held that a post-signing market check, *i.e.* a "go-shop" period, "does not have to involve an active solicitation, so long as interested bidders have an opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal."[74] However, as explained in *In re Topps Co. Shareholders Litigation*, if a *bona fide*, financially capable bidder emerges during a "go-shop" period prescribed under the merger agreement, a board must conduct serious negotiations with it.[75] If *Revlon* applies, the board should fully engage, and make an appropriate record of such engagement, with the bidder on both price and non-price terms to determine if a truly "superior" transaction is available.

Although there is no requirement that selling boards shop their companies to all classes of potential bidders,[76] Delaware courts have criticized sales processes in which the board unreasonably failed to consider certain categories of buyers. In *In re Netsmart Technologies, Inc. Shareholders Litigation*, the Court of Chancery found that the board failed to fully inform itself about possible bidders in its auction process, because management and the company's advisors assumed strategic buyers would not be interested and therefore contacted only potential private equity buyers.[77] The Court held

that a fiduciary violation was likely because it found that the private equity route was favorable to management, potentially biasing them toward such buyers.[78] Because no higher bid was pending, the Court refused to enjoin the transaction and risk losing the deal entirely, but it did require more accurate disclosure to stockholders of the board's decision-making process, including its failure to contact potential strategic buyers.[79] Similarly, in *Koehler* v. *NetSpend Holdings Inc.*, the Delaware Court of Chancery criticized a board's decision to forego a market check when the deal price was well below the low end of the bankers' valuation, and potential private equity bidders were unable to renew discussions because they had signed standstill agreements containing "Don't Ask, Don't Waive" provisions.[80] Although the Court refused to enjoin the transaction and risk scuttling a premium offer, *NetSpend* nonetheless serves as a reminder that boards engaging in single-bidder sales strategies and deploying contractual features such as "Don't Ask, Don't Waive" standstills must do so as part of a robust and carefully designed strategy. "Don't Ask, Don't Waive" provisions are discussed in more depth in Section V.A.2.

The key thread tying these cases together is that compliance with *Revlon* requires the board to make an informed decision about the path to maximizing stockholder value. As the Delaware Supreme Court noted in *Lyondell Chemical Co.* v. *Ryan*, "there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties," and a board's decisions "must be reasonable, not perfect."[81]

Delaware courts have found *Revlon* violations only in rare cases, usually involving unusual, or unusually egregious, circumstances. In 2015, the Delaware Supreme Court upheld the decision of the Delaware Court of Chancery to impose substantial aiding-and-abetting liability on the lead financial advisor of the Rural/Metro ambulance company in that company's sale to a private equity firm.[82] Such aiding-and-abetting liability was predicated on a finding of a *Revlon* violation. The Court found the sales process flawed because the company's lead financial advisor (a) deliberately timed the process to coincide with a strategic process involving another ambulance company to try to obtain lucrative financing work, (b) attempted to provide staple financing to whoever bought Rural, and (c) presented flawed valuation materials.[83] The advisor did not disclose these conflicts to the board. Indeed, the board was not aware of the financial advisor's efforts to provide buy-side financing to the buyer, had not received any valuation information until a few hours before the meeting to approve the deal and did not know that the advisor had manipulated the valuation metrics.[84] Applying enhanced scrutiny under *Revlon*, the Delaware Court of Chancery found that the directors had acted unreasonably and therefore violated their fiduciary duties. The Court then held that the financial advisor had aided and abetted this fiduciary breach and was liable for almost $76 million in damages to the shareholders, even though the company that was sold entered bankruptcy shortly afterward.[85] On appeal, the Delaware Supreme Court affirmed and ruled that the presence of a secondary financial advisor did not cure the defects in the lead advisor's work, and that the post-signing market check could not substitute for the board's lack of information about the transaction.[86] The *Rural/Metro* case is further discussed in Section III.D.

And in 2018, the Delaware Court of Chancery found a *Revlon* violation in the sale of the circuit company PLX Technology, Inc.[87] The Court found that the sales process was undermined by the conflicting interest of an activist hedge fund and its designee on PLX's board who vocally advocated for a near-term sale of PLX. The Court found that the hedge fund and its designee's conflict ultimately "undermine[d] the Board's process and led the Board into a deal that it otherwise would not have approved."[88] The key facts the Court relied on in reaching this conclusion included that the Board allowed the hedge fund to take control of the sales process and instructed management to generate lower revenue projections so as to support a sale at the deal price.[89] As in *Rural/Metro*, the Court also emphasized that the Board's decision was not fully informed, noting that the Board agreed to the final deal price before receiving a standalone valuation of PLX, and that the hedge fund and the company's financial advisor failed to advise the Board that the buyer had informed the company's financial advisor of its plans to bid for PLX and that it was willing to pay a higher price than PLX's Board ultimately approved.[90] The Delaware Court of Chancery's opinion underscores that activists who join boards must adhere to the same fiduciary duties as other directors and must place the interests of the company and all its stockholders above any personal, fund-specific, or short-sighted interests. Finally, the Court of Chancery recently upheld a *Revlon* claim at the pleadings stage based on a board's alleged failure to adequately oversee a CEO who tilted a sale process in favor of a private equity buyer.[91] The Court reserved decision on whether the presumptive standard of review that would apply to the plaintiffs' "fraud on the board" theory at trial would remain *Revlon* or be elevated to the entire fairness standard of review, which is discussed in Section II.B.3 below.[92]

b. ***Unocal***

Courts also apply an enhanced level of scrutiny to the adoption of defensive measures against potential threats to control. Directors who adopt such defensive measures carry the burden of proving that their process and conduct satisfy the enhanced standard established in 1985 by *Unocal Corp.* v. *Mesa Petroleum Co.*[93] This standard requires that the board meet a two-pronged test:

- first, the board must show that it had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed," which may be shown by the directors' reasonable investigation and good faith belief that there is a threat; and

- second, the board must show that the defensive measure chosen was "reasonable in relation to the threat posed," which in *Unitrin, Inc.* v. *American General Corp.* the Delaware Supreme Court defined as being action that is not "coercive or preclusive" and otherwise falls within "the range of reasonableness."[94]

Under the first prong of this test, a court may take issue with defensive action when a board is unable to identify a threat against which it may justifiably deploy anti-takeover efforts. For example, in *Unitrin*, the Court viewed the first prong of *Unocal*—

whether a threat to corporate policy exists—as satisfied based on the board's conclusion that the price offered in an unsolicited takeover bid was inadequate, although it described the threat as "a mild one." *Unitrin* also made clear that a board has discretion to act within a range of reasonably proportional responses to unsolicited offers,[95] *i.e.*, not limited by an obligation to act in the least intrusive way. But the board's discretion under the *Unocal* standard is not unlimited. In the 2000 case *Chesapeake Corp.* v. *Shore*, the Delaware Court of Chancery invalidated the board's adoption of a supermajority voting bylaw in the midst of a consent solicitation and tender offer, stating that *Unitrin* "in no way suggests that the court ought to sanction a board's adoption of very aggressive defensive measures when that board has given little or no consideration to relevant factors and less preclusive alternatives."[96]

The landmark 2011 decision in *Air Products & Chemicals, Inc.* v. *Airgas, Inc.* upheld under *Unocal* the Airgas directors' decision to block a hostile tender offer by refusing to redeem its "poison pill" shareholder rights plan. In ruling for the Airgas board, the Court found that the directors had acted in good faith in determining that Air Products' "best and final" tender offer was inadequate. In making this finding, the Court relied on the fact that the board was composed of a majority of outside directors, that the board had relied on the advice of outside legal counsel and three separate financial advisors, and that the three Airgas directors nominated to the Airgas board by Air Products (and elected by the stockholders) had sided with the incumbents in concluding that Air Products' offer should be rejected. The Court's opinion held that "in order to have any effectiveness, pills do not—and cannot—have a set expiration date."[97] The Court continued that while "this case does not endorse 'just say never.' . . . it does endorse . . . Delaware's long-understood respect for reasonably exercised managerial discretion, so long as boards are found to be acting in good faith and in accordance with their fiduciary duties (after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions). The Airgas board serves as a quintessential example."[98]

Even in the absence of a hostile bid, deal protection devices included in friendly merger transactions—such as termination fees, force-the-vote provisions, expense reimbursements, and no-shop provisions—generally are reviewed under the *Unocal* standard. This is because, as one Delaware Court of Chancery case put it, "[w]hen corporate boards assent to provisions in merger agreements that have the primary purpose of acting as a defensive barrier to other transactions not sought out by the board, some of the policy concerns that animate the *Unocal* standard of review might be implicated."[99] Generally, Delaware courts will consider the effect and potentially excessive character of "all deal protections included in a transaction, taken as a whole," in determining whether the *Unocal* standard has been met.[100]

Announcement of a merger agreement may provoke an unsolicited competing bid by a third party. Since a third-party bid could represent a threatened change-of-control, a target's directors' actions with respect to that bid, including any changes to the original merger agreement, will be governed by the *Unocal* standard even if, as explained in Section II.B.2.a above, *Revlon* would not apply because the initial transaction did not

constitute a change-of-control. In *Time-Warner*, the Delaware Supreme Court allowed directors great latitude in determining when a threat to a previously agreed merger exists. The Time board was permitted to act based on: (1) the "concern . . . that Time shareholders might elect to tender into Paramount's cash offer in ignorance or a mistaken belief of the strategic benefit which a business combination with Warner might produce"; (2) its view of whether the conditions attached to Paramount's offer introduced "a degree of uncertainty that skewed a comparative analysis"; and (3) the issue of whether the "timing of Paramount's offer to follow issuance of Time's proxy notice was . . . arguably designed to upset, if not confuse, the Time stockholders' vote."[101]

Notably, more than one standard of review can apply to directors' decisions during the same transaction. For example, the approval of a friendly stock-for-stock merger may be governed by the traditional business judgment rule, but modifications of that transaction after the appearance of a third-party hostile bidder may be subject to the *Unocal* standard.[102] Similarly, the *Unocal* standard will continue to apply so long as a board's response to a third-party bid is defensive in an effort to keep the company independent, but once a board pursues an alternative transaction that constitutes a change-of-control, the board's decision will generally be subject to *Revlon* scrutiny. As further discussed in Section II.D below, it is not yet clear whether the deference afforded to certain transactions under *Corwin* v. *KKR Financial Services* will be applied to board action assessed under *Unocal* enhanced scrutiny.

c. *Blasius*

Limits on the board's discretion under the *Unocal* standard are especially relevant where "defensive conduct" affects the shareholder franchise or a proxy contest. In those situations, courts may refer to *Blasius Industries, Inc.* v. *Atlas Corp.*,[103] a decision setting forth a standard of review that has since largely been absorbed into *Unocal*. In *Blasius*, the directors of the target increased the size of the board so that a proxy insurgent, which was running a short slate, could not have a majority of the board even if all of its candidates won. The Delaware Court of Chancery invalidated the bylaw as impermissible interference with the stockholder franchise. In *Blasius*, the court set forth a standard of review requiring that a board show "compelling justification" for any conduct whose "primary purpose" is to thwart effective exercise of the franchise. As subsequently demonstrated in *MM Companies Inc.* v. *Liquid Audio, Inc.*,[104] this standard will apply to actions that impede the exercise of the shareholder franchise even where the defensive actions do "not actually prevent the shareholders from attaining any success in seating one or more nominees in a contested election" and where an "election contest [does] not involve a challenge for outright control of the board."[105] On the other hand, Delaware courts are reluctant to apply *Blasius* review outside the context of board elections, stressing that "the reasoning of *Blasius* is far less powerful when the matter up for consideration has little or no bearing on whether the directors will continue in office."[106]

Over time, Delaware courts have suggested that the "compelling justification" standard of *Blasius* need not serve as an independent standard of review, but could

instead exist as a stricter application of the *Unocal* framework.[107] Delaware courts have also suggested that situations in which *Blasius* would apply can simply be subjected to a faithful application of *Unocal* review, which is sufficiently stringent if properly applied.[108] Consequently, defensive conduct affecting the shareholder franchise is probably best viewed as triggering a particularly careful *Unocal* analysis.

3. Entire Fairness

The "entire fairness" standard is "Delaware's most onerous standard [of review]."[109] It imposes the burden of proof upon directors to show the fairness of both the price and process of the transaction they approved. A court will review a board's actions under the entire fairness standard in the following situations:

- when the board breaches its duty of care and the directors are not exculpated from liability under DGCL 102(b)(7);[110]

- when a majority of the board has an interest in the decision or transaction that differs from the stockholders in general;[111]

- when a majority of the board lacks independence from or is dominated by an interested party;[112]

- when the transaction at issue is one where the directors or a controlling stockholder "stand[] on both sides" of a transaction;[113] or

- when a controlling stockholder receives additional consideration to the detriment of the other stockholders.[114]

There is no bright-line test to determine whether an individual director is conflicted, or a majority of directors are conflicted, for purposes of determining whether the entire fairness standard will be applied. A conflict must generally be "material" if it is to be considered disabling,[115] although in some cases, self-dealing by a director standing on both sides of the transaction may suffice to disable that director, regardless of materiality.[116] Potential conflicts can take many shapes, including when a director receives certain payments,[117] has certain family relationships with,[118] or has certain significant prior business relationships with, a party to the transaction,[119] and other instances where a director will benefit or suffer a detriment in a manner that is not aligned with the interests of the public stockholders. A key consideration is whether the director can be said to stand on both sides of the transaction in question, or whether he or she has obtained some benefit not ratably shared with the public stockholders.

For example, in *In re Trados Inc. Shareholder Litigation*, the Delaware Court of Chancery applied entire fairness review to a board's decision to approve a merger that provided consideration to members of management and the company's preferred stockholders, where a majority of the directors were affiliated with either management or the preferred stockholders.[120] On the other hand, directors' mere ownership of different

classes of stock, or of common stock rather than preferred stock, will not necessarily trigger entire fairness review, absent a showing that the directors' holdings of different classes of stock were sufficiently material to make it improbable that the directors could fulfill their obligation to act in the collective best interest of holders of common stock.[121]

The Delaware Court of Chancery has recently applied entire fairness review in the context of differing interests between SPAC sponsors and directors and public stockholders. In *In re MultiPlan Corp. Stockholders Litigation*, the Court applied entire fairness review at the motion to dismiss stage to a de-SPAC transaction in which the SPAC's sponsor and directors owned Class B shares that would expire worthless if a de-SPAC transaction were not completed.[122] The Court opined that they were therefore incentivized to complete a de-SPAC transaction even if it was value-diminishing for Class A public stockholders.[123] The Court rejected the defendants' argument that the ruling would subject all such de-SPAC transactions to entire fairness review, instead focusing on allegedly inadequate disclosures and noting that a different outcome may have resulted if stockholders had been fully informed in deciding whether to redeem their shares.[124] The decision highlights the possibility that certain SPAC transaction structures could lead to entire fairness review, particularly in the absence of adequate disclosures.

Entire fairness review can be triggered even though a majority of directors are disinterested if the conflicted directors control or dominate the board, or if one or more of the conflicted directors failed to disclose his or her interest "and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction."[125]

In addition, entire fairness review frequently applies to transactions involving conflicted controlling stockholders, including "squeeze-out" mergers and other transactions in which the controller stands on both sides. These transactions are examined more closely in Section II.C.2 below.

When analyzing a transaction to determine whether it satisfies the entire fairness standard, a Delaware court will consider both process ("fair dealing") and price ("fair price"), although the inquiry is not a bifurcated one; rather, all aspects of the process and price are considered holistically in evaluating the fairness of the transaction.[126] As the Delaware Supreme Court stated in *Weinberger* v. *UOP*:

> The concept of entire fairness has two basic aspects: fair dealing and fair price. [Fair dealing] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. [Fair price] relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.[127]

A "fair price" has been described as follows:

> A fair price does not mean the highest price financeable or the highest price that fiduciary could afford to pay. At least in the non-self-dealing context, it means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept.[128]

C. Controlling Stockholders, Conflicts and Special Committees

The involvement of a conflicted controlling stockholder in a transaction often results in the application of entire fairness review. The involvement of a disinterested and independent special committee can restore a lower standard of review, shift the burden of persuasion under entire fairness review, or influence the court's application of entire fairness review. Consequently, what constitutes a controlling stockholder and an effective special committee are important subjects that have received significant judicial attention in recent years.

1. Controlling Stockholders

A controlling stockholder is one who (a) controls a majority of a company's voting power, or (b) exercises "a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock."[129] To plead that a stockholder is a controller despite controlling less than a majority of the company's voting power, a plaintiff must allege facts showing "actual domination and control" over the board by the minority stockholder, either generally or with respect to the challenged transaction.[130] Where control over a transaction is alleged, it must be established "that the defendant exercised 'actual control with regard to the particular transaction that is being challenged.'"[131] Delaware decisions have also emphasized that a minority stockholder is only properly held to be a controlling stockholder where its voting power is nevertheless significant enough to make the stockholder "the dominant force in any contested . . . election," even "without having to attract much, if any, support from public stockholders."[132]

"Control" is a fact-intensive concept under Delaware law. Although voting power is a critical component in the control analysis for non-majority stockholders, a stockholder's possession of significant voting power alone is not necessarily sufficient to establish control. For instance, in *In re Western National Corp. Shareholders Litigation*, the Delaware Court of Chancery held that a 46% stockholder was not a controller because the plaintiffs could not show that the large stockholder took steps to dominate or interfere with the board of directors' oversight of the company.[133] By contrast, in *In re Tesla Motors, Inc. Stockholder Litigation*, the Delaware Court of Chancery held that it was reasonably conceivable that a company's CEO holding only 22% voting power was a controlling stockholder.[134] The reasoning underpinning the control ruling appeared to be divorced from the CEO's voting power, focusing instead on an amalgamation of factors, including the CEO's "extraordinary influence within the Company," which the Court found could conceivably allow the CEO to dominate the board's decision-making or

influence a shareholder vote due to his ability to "rally other stockholders" to support him.[135] The Court also appeared to be persuaded that the lack of independence of other directors impacted the control analysis, reasoning that a director is "less likely to offer principled resistance when the matter under consideration will benefit him or a controller to whom he is beholden."[136] And the Delaware Court of Chancery in *FrontFour Capital Group LLC* v. *Taube* concluded on a post-trial record that brothers who in total owned less than 15% of the company's shares were controlling stockholders because the special committee members lacked independence from the brothers and "willfully deferred to their authority."[137]

Other recent decisions have, however, maintained a principled separation between consideration of board independence and minority control, noting that "it does not necessarily follow that an interested party also *controls* directors, simply because they lack independence."[138]

The Court may also look to contractual rights or restrictions that enhance or limit a stockholder's voting power. For example, in *Williamson* v. *Cox Communications, Inc.*, the Court denied a motion to dismiss where the complaint alleged that a group of stockholders with a combined 17.1% stake was a control group in light of the group's board-level appointment rights and certain charter provisions, which together effectively granted the stockholder group veto power over all decisions of the board of directors.[139] In contrast, in *Sciabacucchi* v. *Liberty Broadband Corp.*, the Delaware Court of Chancery found it was not reasonably conceivable that a 26% stockholder in that case could be a controller because, among other reasons, a stockholders agreement prevented that stockholder from accumulating a stake greater than 35%, designating more than four of the company's 10 directors, or soliciting proxies or consents.[140] Similarly, in *In re GGP, Inc. Stockholder Litigation*, the Court of Chancery found that it was not reasonably conceivable that a 35% stockholder with rights under a standstill agreement to acquire up to 45% was a controlling stockholder, noting that "the mere 'potential' that a stockholder might increase its stockholdings" was insufficient to plead control.[141]

Managerial influence or control of a company's day-to-day operations at the executive level in the absence of significant voting power should not be sufficient to establish control. In *In re KKR Financial Holdings LLC Shareholder Litigation*, the Delaware Court of Chancery, later affirmed by the Delaware Supreme Court, rejected the argument that an entity hired by a corporation to manage its "day-to-day operations" was the corporation's controlling stockholder because the plaintiffs had not pleaded facts showing that the entity, which held only 1% of the corporation's stock, was capable of controlling the *board's* decision-making regarding the transaction in question.[142] Other decisions, however, have focused on corporations' public disclosures that particular minority stockholders exert outsized managerial influence as a basis for holding such minority stockholders to be controlling stockholders.[143] In *Zhongpin*, for example, the Court found it was reasonably conceivable that a 17% stockholder could be a controller, citing statements in the company's public filings that their CEO could "exercise significant influence over our company" through his stockholdings.[144] And in *In re*

Pattern Energy Group Inc. Stockholders Litigation, the Court of Chancery left open the possibility that in unusual circumstances, "if a plaintiff pleads sufficient sources of influence, controller status and attendant fiduciary duties may extend to a nonstockholder" if the nonstockholder "holds and exercises soft power that displaces the will of the board with respect to a particular decision or transaction."[145]

In addition, the Court may consider that two or more minority stockholders acting together could constitute a control group where they otherwise would not individually. In *In re Hansen Medical, Inc. Stockholders Litigation*, the Delaware Court of Chancery declined to grant a motion to dismiss on the basis that plaintiff stockholders had sufficiently pleaded a "reasonably conceivable" claim that two constituent groups holding 34% and 31% of the company's stock, respectively, together constituted a control group, on the basis of their 21-year history of investment cooperation and coordination.[146] Similarly, in *Garfield* v. *BlackRock Mortgage Ventures, LLC*, the Delaware Court of Chancery concluded that two stockholders that held 46% of the company's voting stock, certain blocking rights, and the right to designate a total of 4 out of 11 directors, constituted a control group based on the allegations that the two stockholders were the company's founding sponsors, that they had invested together in the company for ten years, and that management had met jointly with them to negotiate the challenged transaction.[147]

On the other hand, in *Sheldon* v. *Pinto Technology Ventures, L.P.*, the Delaware Supreme Court affirmed the Delaware Court of Chancery's finding that three venture capital funds holding 60% of the company's stock did not constitute a control group, holding that "a mere concurrence of self-interest among certain stockholders" without "some indication of an actual agreement" is insufficient to establish a control group.[148] The Delaware Supreme Court noted that the venture capital funds' voting agreement did not require them to vote together on any transaction, and their prior interactions in other investments "merely indicate that venture capital firms in the same sector crossed paths in a few investments."[149]

The standard for control sets a high bar, but certain recent case law has tended to focus less on voting power and more on other factors, and transaction planners should accordingly consider carefully whether a minority stockholder with a relatively small voting stake could be at risk of facing Court-imposed controlling stockholder obligations.[150]

2. Transactions Involving Conflicted Controllers or Differential Consideration

As discussed above, conflicted controlling stockholder transactions are generally subject to the entire fairness standard of review, subject to important exceptions described at the end of this section. Such transactions include "squeeze-out" mergers in which a controlling stockholder buys out the minority stockholders, as well as other transactions in which the controller stands on both sides, such as the purchase of assets

owned by the controller, a transaction with another company owned by the controller, or an acquisition by a company with which the controller has a significant relationship.

The entire fairness standard of review may also apply to acquisitions of a controlled company by a third party unaffiliated with the controller if the controlling stockholder receives different consideration than the minority stockholders. For example, in *In re Tele-Communications, Inc. Shareholders Litigation*, the Delaware Court of Chancery held that entire fairness review applied to the 10% premium that the high-vote shares received in the transaction relative to the low-vote shares because the controlling stockholder and a majority of the TCI directors held a disproportionate amount of the high-vote shares.[151] In *In re John Q. Hammons Hotels Inc. Shareholder Litigation*, the Delaware Court of Chancery also held that entire fairness applied to a merger where the controlling stockholder and the minority stockholders received slightly different consideration, noting that they were "in a sense 'competing'" for portions of the consideration offered by an unaffiliated third-party buyer, and the procedural protections employed were insufficient to invoke the business judgment rule.[152] Nevertheless, in a post-trial opinion, the Delaware Court of Chancery found that the transaction was entirely fair.[153]

In the 2012 *In re Delphi Financial Group Shareholder Litigation*[154] decision, the special committee approved a merger that paid the founder, CEO and controlling stockholder an additional premium for his high-vote shares, even though the company's charter prohibited holders of such high-vote shares from receiving disparate consideration in any merger. Despite the founder's refusal to accept the same price as the low-vote shares, the special committee approved the merger because the committee believed that the founder would otherwise "jettison" the deal and deprive the low-vote stockholders of a "circa-100%" premium on their shares.[155] Ruling on the application for a preliminary injunction, the Delaware Court of Chancery applied entire fairness review to the disparate consideration received by the founder and concluded that plaintiffs were likely to demonstrate at trial that the founder violated his fiduciary duties, largely because he had already "sold his right to a control premium" to the low-vote stockholders via the charter (even though stockholders approved an amendment of this provision in connection with the deal).[156] The Court however refused to enjoin the merger vote, reasoning that stockholders should "decide for themselves" whether to accept the merger consideration and that money damages could largely remedy any harm suffered by the minority stockholders.[157]

Subjecting conflicted controlling stockholder transactions to the approval of an effective special committee or the non-controlling stockholders (often referred to simply as the "minority stockholders") may shift the burden of proving entire fairness to the plaintiff. Furthermore, subjecting such transactions from the outset to the approval of both an effective special committee *and* the non-controlling stockholders in a fully informed, uncoerced vote may lower the standard of review to business judgment, as explained in Section II.D.2 below.

3. Effective Special Committees

With respect to process, the Delaware Supreme Court has long encouraged boards to utilize a "special committee" of independent directors when a conflict transaction is proposed. As discussed at greater length below, the purpose of a special committee is to reproduce the dynamics of arm's-length bargaining. To be effective, a special committee generally should: (1) be properly constituted (*i.e.*, consist of independent and disinterested directors); (2) have an appropriately broad mandate from the full board (*e.g.*, not be limited to simply reviewing an about-to-be-agreed-to transaction); and (3) have its own legal and financial advisors.[158] The use of a well-functioning special committee shifts the burden of proof regarding entire fairness from the defendant to the plaintiff, thus requiring plaintiff to prove that a transaction was not entirely fair, rather than requiring defendant to prove that it was entirely fair. The quantum of proof needed under entire fairness is a "preponderance of the evidence," which has led the Delaware Supreme Court to note that the effect of a burden shift is "modest," as it will only prove dispositive in the rare instance where the evidence is entirely in equipoise.[159] Nevertheless, the Delaware Supreme Court has also stressed that it views the use of special committees as part of the "best practices that are used to establish a fair dealing process," and thus special committees remain important in conflict transactions.[160] And, in light of *M&F Worldwide*, explained in detail in Section II.D.2 below, a controller's agreement in advance to "voluntarily relinquish[] its control" by conditioning a transaction "upon the approval of both an independent, adequately empowered Special Committee that fulfills its duty of care, and the uncoerced, informed vote of a majority of the minority stockholders" will result in the application of business judgment review rather than entire fairness review.[161] Factors considered in determining whether a special committee functioned adequately are further described below. It bears noting that approval of a take-private merger with a controlling shareholder by a majority of the minority shareholders also shifts the burden of proof, provided that the disclosures to the shareholders are deemed sufficient.

Decisions of the Delaware courts have repeatedly emphasized the need for the members of a special committee to be independent of the transaction proponent, well informed, advised by competent and independent legal and financial advisors, and vigorous in their negotiations of the proposed transaction.[162]

a. Disinterestedness and Independence of Committee Members

Special committees are only effective to impact the standard of review and/or the burden of proof if their members are disinterested and independent. In determining director independence and disinterestedness, a board should have its directors disclose their compensatory, financial and business relationships, as well as any significant social or personal ties that could be expected to impair their ability to discharge their duties. The Delaware Supreme Court has stressed that all of these factors must be considered "in their totality and not in isolation from each other."[163] Paying close attention to which directors are selected to serve on a special committee is important, and care should be taken to vet the independence of those selected.[164] The use of a special committee will

not shift the burden of proving unfairness to the plaintiffs if the directors on the committee are viewed as "beholden" to a controlling stockholder.[165] Even if a director does not have a direct personal interest in the matter being reviewed, the director will not be considered qualified if he or she lacks independence from the controlling stockholder or some other person or entity that is interested in the transaction.

Certain compensatory relationships can lead to independence concerns. For example, in the 2004 case *In re Emerging Communications, Inc. Shareholders Litigation*, the Delaware Court of Chancery questioned the independence of a member of a special committee because he was a paid consultant of an affiliate of the controlling stockholder.[166] Familial relationships may also be disqualifying. In *Harbor Finance Partners* v. *Huizenga*, the Delaware Court of Chancery held that a director who was the brother-in-law of the CEO and involved in various businesses with the CEO could not impartially consider a demand that was adverse to the CEO's interests.[167] And the confluence of business and social relationships may together compromise a director's independence. For instance, in *Delaware County Employees' Retirement Fund* v. *Sanchez*, the Delaware Supreme Court ruled that allegations that a director had "a close friendship of over half a century with the interested party" and that "the director's primary employment . . . was as an executive of a company over which the interested party had substantial influence" adequately raised a doubt that the director was not independent.[168] In *Sandys* v. *Pincus*, the Delaware Supreme Court held that a director lacked independence from an interested party because the director and her husband co-owned a private plane with the interested party.[169] In so holding, the Court noted that co-owning an airplane was uncommon and inferred that the families of the director and the interested party were extremely close to each other and thus were intimate friends.[170] In *Cumming* v. *Edens*, the Delaware Court of Chancery found that one director lacked independence from an interested party because of her employment in a leadership position at a charity where the interested party's wife served on the board of directors and to which the interested party had made significant financial contributions.[171] The Court in *Cumming* also found that another director lacked independence from the same interested party because that director had been invited by the interested party to join an ownership group of a professional basketball team.[172] Additionally, in *In re Oracle Corp. Derivative Litigation* decision, the Delaware Court of Chancery found that a director lacked independence from founder and 28% stockholder Lawrence Ellison based on the director's "multiple layers of business connections with Oracle," including being "affiliated with two venture capital firms that operate in areas dominated by Oracle."[173] The Court found that those connections, combined with the "rather lucrative" director fees that would be jeopardized if the director sued Ellison, were sufficient to discredit the director's independence.[174] Although some of these cases involved the demand futility framework rather than the assessment of a special committee's independence, they reflect a trend in the Delaware courts that may suggest closer scrutiny of business, social, or financial relationships between board members.

Not all relationships between special committee members and management or controlling stockholders will give rise to independence concerns, however, and Delaware

courts have offered broad guidance on this topic. For example, the Delaware Supreme Court has rejected the concept of "structural bias," *i.e.*, the view that the professional and social relationships that naturally develop among members of a board impede independent decision-making.[175] In *Yucaipa American Alliance Fund II, L.P.* v. *Riggio*, the Delaware Court of Chancery found a director independent despite her having previously served as an executive under the company's founder and former CEO 10 years prior.[176] Nor is the fact that a stockholder had elected a director a sufficient reason to deem that director lacking independence.[177] The Delaware Court of Chancery has also refused to accept a "transitive theory" of conflict, rejecting the argument that a director lacks independence from an alleged controller because the director is allegedly beholden to someone else who, in turn, is allegedly beholden to the controller.[178] In *M&F Worldwide*, the Delaware Supreme Court reinforced that "[a] plaintiff seeking to show that a director was not independent must satisfy a materiality standard" and that neither "the existence of some financial ties between the interested party and the director" nor "allegations that directors are friendly with, travel in the same social circles as, or have past business relationships with the proponent of a transaction" are sufficient to rebut the presumption of independence.[179] Notably, the Delaware Supreme Court approved then-Chancellor Strine's finding that the directors' satisfaction of the independence standards of the New York Stock Exchange (the "NYSE") was informative, although not dispositive, of their independence under Delaware law.[180] A failure to meet stock exchange independence standards can be informative of a director's independence under Delaware law as well. In *Sandys*, the Delaware Supreme Court reasoned that the board would not have taken lightly the decision to classify directors as lacking independence under Nasdaq standards, and that the Nasdaq standards raised similar issues to those relevant under Delaware law, while reiterating that Delaware and stock exchange standards were still not equivalent.[181] The Court concluded that the directors in question lacked independence.[182]

b. The Committee's Role and Process

The function of a special committee is to protect stockholder interests by delegating a decision to a group of independent, disinterested directors in cases where the interests of certain directors (such as directors participating in a management buyout or representing a controlling stockholder) differ significantly from those of the public stockholders. The influence (and number) of interested directors on a board may be relevant in determining the desirability of forming a special committee. For example, a board consisting of a majority of independent directors may not be significantly affected by management directors promoting a leveraged buyout. It may be sufficient for interested directors to recuse themselves from any deliberations and votes in connection with a proposed transaction. As the Delaware Court of Chancery has explained, "[t]he formation of a special committee can serve as 'powerful evidence of fair dealing,' but it is not necessary every time a board makes a decision."[183]

If directors who have a personal interest that conflicts with those of the public stockholders constitute a minority of the board, the disinterested majority can act for the board, with the interested members abstaining from the vote on the proposal. But if a

majority of the board is not disinterested, under Delaware law, absent appropriate procedural protections, the merger will be reviewed under the "entire fairness" standard, with the burden of proof placed on the board.[184]

The need for a special committee may shift as a transaction evolves. Acquirors that begin as third-party bidders may become affiliated with management directors, or management may organize and propose a management buyout in response to an unsolicited bid from a third party. Throughout a sale process, the board and its advisors must be aware of any conflicts or potential conflicts that arise. Failure to disclose such conflicts may result in substantial difficulties in defending the board's actions in court.[185]

Even where a majority of directors is independent, delegation of negotiation or review functions to a special committee may be appropriate or expedient in certain contexts; however, there is no automatic need to create a special committee of directors, or to layer on separate newly retained advisors (legal or financial) in every instance where there may potentially be conflicts.

Delaware courts closely review the conduct of parties in controlling stockholder transactions and have in several cases been skeptical of processes that did not involve the active participation of a special committee. The Delaware Court of Chancery held in *In re Digex, Inc. Shareholders Litigation* that the conflicted directors on a board controlled by a majority stockholder had likely breached their fiduciary duties by agreeing to waive the protections of the Delaware business combination statute in favor of the acquiror of that majority stockholder over the opposition of the independent directors on the special committee.[186] In *McMullin* v. *Beran*,[187] the Delaware Supreme Court reversed a dismissal of a challenge to the directors' conduct where, in connection with the approval of a merger agreement between a controlled subsidiary and a third party, an already-established special committee was not empowered to participate in the sale process and the majority stockholder controlled the process and allegedly had interests divergent from those of the public stockholders.

As explained in Section II.C.3 above, the presence of a well-functioning special committee can shift the burden of proof to the plaintiff in an entire fairness case. To achieve this burden shift, the special committee must follow proper procedures. For example, in the context of a transaction with a majority stockholder, "the special committee must have real bargaining power that it can exercise with the majority stockholder on an arm's-length basis."[188] The special committee should receive independent financial and legal advice, negotiate diligently and without the influence of the controlling stockholder, and should possess all relevant material information, including material facts relating to the value of the assets to the stockholder itself, including alternative uses.[189] The controlling stockholder need not, however, disclose information relating to its reservation price, how it would finance a purchase or invest the proceeds from a sale, or other information that "would undermine the potential for arm's-length negotiations to take place."[190] In *Kahn* v. *Lynch Communication Systems, Inc.*, the Delaware Supreme Court suggested that even where a special committee obtains independent legal and financial advice and negotiates diligently, the requisite degree of

independence may still be lacking if the committee and controlling stockholder fail to establish that the committee has the power to negotiate independently.[191]

The special committee should have a clear conception of its role, which should include a power to say no to the potential transaction.[192] In *Southern Peru*,[193] the Delaware Court of Chancery criticized the role of the special committee in reviewing a merger proposal from a controlling stockholder. The Court stated that the special committee's "approach to negotiations was stilted and influenced by its uncertainty about whether it was actually empowered to negotiate" and that the special committee "from inception . . . fell victim to a controlled mindset and allowed [its controlling stockholder] to dictate the terms and structure of the [m]erger."[194] The Delaware Supreme Court affirmed the Delaware Court of Chancery's rulings and adopted its reasoning.[195] Indeed, the Delaware Court of Chancery has held, on a motion to dismiss, that in some circumstances, the failure to employ a pill, together with other suspect conduct, can support a claim for breach of the duty of loyalty.[196] A special committee that does not recognize, even in the context of a takeover bid by a controlling stockholder, that it may refuse to accept the offer might bear the burden of proving the entire fairness of the transaction in court.[197] The ability to say no must include the ability to do so without fear of retaliation. In *Lynch*, the Delaware Supreme Court was persuaded that the special committee's negotiations were influenced by the controlling stockholder's threat to acquire the company in a hostile takeover at a much lower price if the special committee did not endorse the controlling stockholder's offer.

Even where a process is imperfect, a fully empowered and well-functioning special committee can significantly influence an entire fairness analysis. In the 2017 case *ACP Master, Ltd.* v. *Sprint Corp.*,[198] the Delaware Court of Chancery found that the acquisition of Clearwire by its controlling stockholder, Sprint, satisfied entire fairness notwithstanding "blemishes, even flaws" early in the deal process, including retributive threats and vote-buying by Sprint.[199] The Court noted that minority stockholders' opposition to Sprint's initial offer and the special committee's engagement with a competing buyer "freshened the atmosphere and created a competitive dynamic," which ultimately resulted in a higher price for Clearwire.[200]

Special committees and their advisors should be proactive in seeking all relevant information (potentially including valuation information and information held by management or the transaction proponent) and in negotiating diligently on behalf of stockholders.[201] The records of the deliberations of a special committee and the full board should reflect careful and informed consideration of the issues.[202]

c. Selection of the Committee's Advisors

The best practice is for the special committee itself, rather than management or a controlling stockholder, to choose its own financial and legal advisors. In *Macmillan*, the Delaware Supreme Court was critical of the conduct of an auction to sell the company in which a financial advisor selected by the company's CEO, rather than by the special committee, played a dominant role.[203] In *In re Tele-Communications, Inc. Shareholders*

Litigation,[204] Chancellor Chandler found that the special committee's decision to use the company's legal and financial advisors rather than retaining independent advisors "raise[d] questions regarding the quality and independence of the counsel and advice received." And in 2006 in *Gesoff* v. *IIC Industries Inc.*,[205] Vice Chancellor Lamb strongly criticized a special committee's use of advisors who were handpicked by the majority stockholder seeking a merger.

Whether the special committee should retain advisors with a previous relationship with the corporation is a context-specific decision. While having a special committee advised by firms that have close ties to the company may raise independence concerns, it is not in all cases better for the special committee to choose advisors who are unfamiliar with the company or to avoid hiring advisors who have done prior work for the company. In one case, Justice Jacobs (sitting as a Vice Chancellor) criticized a process in which the company's historical advisors were "co-opted" by the majority stockholder, leaving the special committee with independent advisors who did not know the company well and who lacked the information available to the majority stockholder's advisors.[206]

As a practical matter, some companies may have had at least some prior dealings with close to all of the financial or legal advisors who would have the relevant experience and expertise to advise a special committee on a transaction that is particularly complicated or of a certain size. If the special committee chooses to engage an advisor with such prior dealings, it should carefully document any potential conflict, the reasons the special committee considered it important to engage the advisor, and the measures the special committee took to mitigate any such conflict. Such measures may include negotiating carefully worded confidentiality provisions and structuring the advisor's fee to prevent any misaligned incentives. The committee may also choose to hire a second advisor for a particular role, although it should take care to ensure that the second advisor's presence will successfully mitigate the conflict that has been identified—for example, by ensuring that the new advisor is not merely a "secondary actor," and by not compensating it on a contingent basis.[207] Interviewing several advisors, and ensuring a record of such through board and committee minutes, will also help to show that a special committee was aware of its options and made an informed decision in hiring its advisors, without delegating the decision to management.

D. Stockholder Approval and Shifting the Standard of Review

Under certain circumstances and by following certain procedural requirements, the standard of review generally applicable to specific transactions may be lowered to business judgment review. Specifically, recent case law has held that the fully informed and uncoerced approval of a third-party (*i.e.*, non-controller) change-of-control transaction by disinterested stockholders can lower the applicable standard of review from enhanced scrutiny to business judgment. And the fully informed approval of *both* a well-functioning and independent special committee of directors *and* the majority of the minority stockholders can lower the standard of review from entire fairness to business judgment in controller transactions.

1. Standard-Shifting in Non-Controller Transactions

Stockholders' ability to approve or ratify a transaction and thereby shield it from judicial scrutiny stems from a longstanding doctrine.[208] As explained below, recent decisions have clarified that a fully informed, uncoerced vote of a disinterested stockholder majority will result in the irrebuttable application of the business judgment presumption, provided that a conflicted controlling stockholder is not present. The rule can apply to transactions that may otherwise have been subject to enhanced scrutiny or entire fairness, unless entire fairness applies *ab initio* due to the presence of a conflicted controlling stockholder. In such cases, a more rigorous procedure explained in the next section can be used to shift the standard of review.

The renewed interest in this rule began with *Corwin* v. *KKR Financial Holdings LLC*, where the Delaware Supreme Court held that "the business judgment rule is invoked as the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders."[209] In doing so, the Court rejected plaintiffs' argument that enhanced scrutiny under *Revlon* should apply, noting that Delaware's longstanding policy has been to avoid second-guessing the decisions of informed, disinterested, and uncoerced stockholders.[210] The Delaware Supreme Court further clarified that the cleansing effect of stockholder approval applied regardless of whether the stockholder vote was held on a voluntary basis or was statutorily required to complete the transaction.[211]

In *In re Volcano Corp. Stockholder Litigation*, the Delaware Court of Chancery determined that the fully informed acceptance of a tender offer by an uncoerced, disinterested stockholder majority as the first step of a two-step merger under Section 251(h) of the DGCL would result in the same cleansing effect as a stockholder vote.[212]

Subsequent decisions have further explained the cleansing effect of stockholder approval. In *Singh* v. *Attenborough*, the Delaware Supreme Court noted that the application of the business judgment rule following stockholder approval under *Corwin* precludes any attempt to rebut the rule based on allegations of breach of the duty of care.[213] The Court stressed that applying the business judgment rule in this context should typically result in dismissal, because the transaction would be shielded from attack on all grounds other than waste, and the "vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful."[214] Importantly, the Court also extinguished aiding and abetting claims against the financial advisor as part of the cleansing effect of *Corwin*.[215]

Later rulings have clarified *Corwin*'s exception for transactions that are "subject to the entire fairness standard of review." In *Larkin* v. *Shah*, the Delaware Court of Chancery held that, if fully informed, uncoerced and disinterested stockholders approve a transaction under *Corwin*, the business judgment rule irrebuttably applies in the absence

of a conflicted controlling stockholder.[216] Consequently, even if the business judgment presumption could have been rebutted because a board was alleged to lack a disinterested and independent majority, stockholder approval will cleanse the transaction and shield it from judicial scrutiny, provided that there is no conflicted controller.[217]

Corwin will not apply if the stockholders' vote was not fully informed. The plaintiff bears the initial burden of adequately pleading a material omission or misstatement.[218] If the plaintiff is successful, the defendant will bear the burden of proving that the vote was fully informed.[219] In order for the stockholders' vote to be viewed as fully informed, stockholders must be apprised of all material facts regarding the transaction.[220] Although the preference of the Delaware Court of Chancery is to consider disclosure claims before closing so as to provide equitable relief that could lead to a fully informed vote,[221] it remains to be seen whether the failure to bring such disclosure claims before closing can prevent a plaintiff from later using them to circumvent *Corwin* by pleading that stockholder approval was not fully informed.[222]

Because a fully informed vote can be the determining factor in whether a transaction is afforded business judgment deference under *Corwin* or is subjected to the enhanced scrutiny or entire fairness review, complete and accurate disclosure of material information before any stockholder vote is of particular importance in this context, and Delaware courts have refused to grant business judgment deference under *Corwin* when it considers stockholder disclosures to be potentially inadequate. In *Morrison* v. *Berry*, the Delaware Supreme Court reversed a *Corwin*-based dismissal, finding that the company's disclosures misleadingly represented the founder's agreement with the buyer to roll over his equity interest in a transaction and that the founder had stated that he would sell his shares absent a transaction.[223] Importantly, the Court held that "'partial and elliptical disclosures' cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine," particularly in transactions involving the sale of the company.[224] In *Appel* v. *Berkman*, the Delaware Supreme Court reversed another *Corwin*-based dismissal where a target company in a front-end tender offer transaction failed to disclose that its founder and former CEO abstained from voting on the transaction (in his capacity as chairman of the board) and held off on deciding whether or not to tender his shares due to his disagreement with the board's assessment of the fairness or timing of the transaction.[225] In *Xura*, the Delaware Court of Chancery found that *Corwin* deference was not appropriate where the plaintiffs adequately pled several inadequate disclosures, including failing to disclose that the company's CEO had regularly communicated with the acquiror and negotiated price terms without the Board's knowledge.[226] And in *Chester County Employees' Retirement Fund* v. *KCG Holdings, Inc.*, the Delaware Court of Chancery recently declined to apply *Corwin* deference where plaintiffs had adequately alleged that the company failed to disclose, among other things, that the CEO had initially voted against the company's proposed counteroffer on the basis that the price was too low, but later supported the transaction at a lower price after negotiating a compensation pool for himself.[227] On the other hand, even where deficient disclosures prevent the application of *Corwin* deference, they do not constitute a *per se* fiduciary breach in the absence of an adequately pleaded claim for breach of fiduciary duty.[228]

The vote also must not be coerced for business judgment deference under *Corwin* to be granted. Coercion and control are related inquiries, because "coercion is assumed, and entire fairness invoked, when the controller engages in a conflicted transaction, which occurs when a controller sits on both sides of the transaction, or is on only one side but 'competes with the common stockholders for consideration.'"[229]

However, recent cases have suggested that coercion can also occur outside the control context. In *Sciabacucchi* v. *Liberty Broadband Corp.*, although the Court held that no controlling stockholder was present, it found it reasonably conceivable that the transactions being challenged had been approved through a structurally coercive stockholder vote sufficient to prevent the use of a *Corwin* defense.[230] The Court explained that a structurally coercive vote is "a vote structured so that considerations extraneous to the transaction likely influenced the stockholder-voters, so that [the Court] cannot determine that the vote represents a stockholder decision that the challenged transaction is in the corporate interest."[231] The Court found that certain value-enhancing transactions had been conditioned on the approval of the challenged transactions, and that the challenged transactions therefore had not been evaluated solely on their own merit.[232] In *In re Saba Software, Inc. Stockholder Litigation*, the Delaware Court of Chancery similarly refused to grant business judgment deference under *Corwin* after finding it reasonably conceivable that the stockholder vote was structurally coerced because stockholders were presented with a "Hobson's choice" between approving the merger in question or holding shares that had recently been de-listed as a result of the company's inexplicable and repeated failure to restate its financials.[233]

The *Corwin* doctrine reflects the powerful but simple principle that the informed judgment of stockholders who control the corporate vote is entitled to deference, and the Delaware courts have stressed that the doctrine was intended to "avoid judicial second-guessing" about the economic merits of a transaction but "was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained."[234] The Delaware Court of Chancery has also recently clarified that *Corwin* is not intended to restrict stockholders' rights to obtain books and records under 8 *Del. C.* § 220, noting that the fact that defendants may seek to dismiss a challenge to a transaction under *Corwin* does not inhibit stockholders from seeking books and records regarding the challenged transaction, which the stockholders may use to attempt to overcome a *Corwin* defense.[235]

Finally, although it appears that the *Corwin* doctrine can apply to transactions that would otherwise have been subject to enhanced scrutiny under *Revlon* or to transactions that would otherwise be subject to entire fairness review, the Delaware Court of Chancery has not yet opined on whether *Corwin* can shield transactions challenged as preclusive and coercive under *Unocal*. In *In re Paramount Gold & Silver Corp. Stockholders Litigation*, the Delaware Court of Chancery noted potential tension in that regard between the Delaware Supreme Court's earlier decision in *In re Santa Fe Pacific Corp. Shareholder Litigation*, where the Court held that a fully informed stockholder vote

approving a transaction did not preclude judicial review of certain deal protection devices under *Unocal*, and the more recent *Corwin* doctrine, but declined to address the question, finding instead that the agreement in question was not a deal protection device and thus did not implicate *Unocal* analysis in the first instance.[236]

2. Standard-Shifting in Controlling Stockholder Transactions

Since the 2014 Delaware Supreme Court's decision in *Kahn* v. *M&F Worldwide Corp.*, a controlling stockholder has been able to obtain business judgment review treatment if it and the board follow specific requirements. As described below, although *M&F Worldwide* addressed a "squeeze-out" merger, the Delaware Court of Chancery has held that the standard applies to other conflict transactions and third-party sales involving a controlling stockholder, as well.[237] To qualify for business judgment review, the following conditions must be satisfied: "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority."[238] Moreover, the conditions of approval by a Special Committee and by a majority of the minority stockholders must apply to the proposed transaction from the outset.[239] The Court in *M&F Worldwide* also noted that the proper use of *either* special committee *or* majority-of-the-minority approval alone "would continue to receive burden-shifting within the entire fairness standard of review framework."[240]

The Delaware Supreme Court clarified application of the *M&F Worldwide* requirements in *Flood* v. *Synutra International, Inc.* The Court affirmed the Delaware Court of Chancery's dismissal of the complaint, rejecting a "bright-line" requirement that the controller commit to the protective conditions in the very first written expression of interest, and agreeing with the trial court that *M&F Worldwide*'s requirement that the controller's proposal be conditioned on approval by a Special Committee and by a majority of the minority stockholders is satisfied if these conditions are included "before any substantive economic negotiations begin."[241] But as the Delaware Supreme Court recently held in *Olenik* v. *Lodzinski*, if "preliminary discussions transition[] to substantive economic negotiations," the *M&F Worldwide* standard will not apply.[242] The Court found that this transition occurred "when the parties engaged in a joint exercise to value [the relevant companies]," and accordingly reversed the Delaware Court of Chancery's application of *M&F Worldwide*.[243]

In *In re Dell Technologies Inc. Stockholder Litigation*, the Delaware Court of Chancery addressed the forms of coercion that would potentially preclude the application of *M&F Worldwide*, including both coercion of the special committee and of the stockholder vote.[244] The Court considered different forms of coercion relevant to cleansing votes under *M&F Worldwide* and *Corwin*, including "situational coercion," in which a stockholder vote in the midst of an "unacceptable status quo" may not have cleansing effect if the vote on the transaction is not "an endorsement of the merits," but

rather reflects "a preference for a marginally better alternative over an already bad situation."[245] The Court declined to apply the *M&F Worldwide* framework at the pleading stage, concluding, as it relates to "situation coercion," that it was reasonably conceivable that both the special committee and the minority stockholders approved the transaction because the alternative they faced was a threat that the company would exercise a contractual conversion right with respect to the company's Class V shares that would subject Class V stockholders to significant uncertainty.[246]

The Delaware Court of Chancery has applied the *M&F Worldwide* standard on a motion to dismiss in multiple cases. For example, in *In re Books-A-Million Stockholders Litigation*, the Court discussed the effect of pleading bad faith in an *M&F Worldwide* context, opining that successfully pleading bad faith would suffice to rebut the business judgment rule under the framework.[247] The Court rejected the plaintiffs' argument that the Special Committee's decision to take a lower-priced offer from the controlling stockholder rather than a comparable, higher-priced offer from a third party, was indicative of bad faith by the committee, reasoning that the controller's offer was of a different nature because it already possessed control, while a third party would be expected to pay a premium for control.[248] Furthermore, the controlling stockholder was not obliged to become a seller, nor was the Special Committee required to deploy corporate powers to attempt to force the controller to sell.[249] Finding no reasonably conceivable inference of bad faith or that the *M&F Worldwide* conditions were not met, the Court applied the business judgment rule and dismissed the case. In contrast, in *Arkansas Teacher Retirement System* v. *Alon USA Energy, Inc.*, the Delaware Court of Chancery declined to apply the *M&F Worldwide* framework, despite the special committee and majority-of-the-minority requirements being imposed before the first formal offer.[250] Following the *Olenik* decision described above, the Court found that meetings from the previous six months to discuss potential deal structures and exchange ratios were "substantive in nature" and thus prevented the application of *M&F Worldwide*.[251]

Finally, as explained in *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*, standard-shifting under *M&F Worldwide* can occur not only in "squeeze-out" transactions or other transactions in which the controller stands on both sides of the transaction, but also in third-party sales in which the controller allegedly receives disparate consideration.[252] The same requirements, including that the standards be applied from the outset, apply in such circumstances.[253] In *IRA Trust FBO Bobbie Ahmed* v. *Crane*, the Court also held that the *M&F Worldwide* standard could be used to shift the standard of review in conflict transactions not involving a sale of the company, finding in that case "no principled basis on which to conclude that the dual protections in the [*M&F Worldwide*] framework should apply to "squeeze-out" mergers but not to other forms of controller transactions."[254] And in *Tornetta* v. *Musk*, the Court applied *M&F Worldwide* beyond "transform[ative]" transactions by holding in that case that disinterested stockholder approval of the founder-CEO's incentive-based compensation package was alone insufficient to restore the business judgment rule to the board's approval of the package.[255]

III.

Preliminary Considerations in the M&A Deal-Making Process

A. Preliminary Agreements: Confidentiality Agreements and Letters of Intent

Companies considering M&A transactions should be cognizant of certain risks arising from negotiations that take place and agreements that are entered into before the execution of definitive transaction agreements. Preliminary agreements, such as confidentiality agreements and letters of intent, are sometimes seen as routine or relatively inconsequential. Because of this, parties may enter into these agreements without sufficient consideration of their provisions, sometimes without involving counsel at all, only to later find themselves restricted or obligated in ways they had not anticipated. It is important to appreciate that the M&A process begins with (or even before) the first discussions and that each step in the process may have significant consequences.

1. Confidentiality Agreements

Often, the first legally binding undertaking in an M&A transaction negotiation is the execution of a "confidentiality agreement," which is sometimes referred to as a "non-disclosure agreement" or "NDA." It is entirely understandable that a company providing its proprietary or non-public information to another company would want to protect such information's confidentiality and ensure that it is only used for the intended purpose for which such information is being provided. However, this seemingly innocuous document often includes important substantive agreements. For example, a confidentiality agreement will often contain an express "standstill" provision restricting the ability of the party (or parties, if it is mutual) receiving information from taking various actions with respect to the other party, including commencing a takeover bid, buying shares, participating in proxy contests and engaging in other acts considered "unfriendly" to the party providing the information. This standstill agreement will continue for a set period or, in some cases, until a specified "fall-away" event, such as agreeing to a transaction with a third party.

When standstill provisions are included in confidentiality agreements, they are typically worded very tightly to prevent a party that has obtained confidential information about a company from making an unsolicited bid or otherwise taking harmful action against the disclosing party. To prevent evasion of the standstill, these provisions often specify that the bound party may not even request a waiver of these restrictions. Delaware courts in recent years have focused on these provisions, which they call "Don't Ask, Don't Waive" clauses, to ensure that they do not unduly restrict a board of directors from complying with its *Revlon* duties to maximize shareholder value if a decision is made to sell the company. The courts have recognized, however, that a "Don't Ask, Don't Waive" provision may sometimes be appropriate. For example, when conducting an auction to sell the company, the board may decide to include a "Don't Ask, Don't

Waive" provision to incentivize bidders to put their best foot forward in the auction rather than holding back, knowing they can overbid the auction winner later. Because of the effect such a provision may have, the Delaware courts have indicated that they would expect a board to include it only after careful consideration of its impact. These provisions and the developments in Delaware case law on this issue are discussed in Section V.A.2.

Even in the absence of an explicit standstill provision, a confidentiality agreement may still work to prohibit the parties from taking certain actions in support of unsolicited bids. In addition to requiring that information provided be kept confidential, confidentiality agreements typically restrict the use of the information provided for the purpose of evaluating and negotiating a transaction (sometimes a specifically contemplated transaction) between the parties. Until 2012, Delaware courts had not considered whether a violation of disclosure and use restrictions in a confidentiality agreement would be a basis for blocking a takeover bid. The Delaware Court of Chancery's 2012 decision in *Martin Marietta Materials, Inc.* v. *Vulcan Materials Co.*,[256] which subsequently was affirmed by the Delaware Supreme Court, determined that Martin Marietta breached both the use and disclosure restrictions in two confidentiality agreements by using such information in its unsolicited takeover bid for Vulcan. Although then-Chancellor Strine found the wording to be ambiguous (but more consistent with Vulcan's reading), after an exhaustive interpretive analysis of the language of the agreements and parsing of whether a business combination "between" the parties would include a hostile takeover and proxy contest, he concluded that the parties—especially Martin Marietta—intended the agreement to preclude use of the information exchanged in a hostile transaction. He also held that Martin Marietta had willfully breached its non-disclosure commitments by disclosing details of the parties' confidential negotiations in tender and other materials, without complying with the required procedures under the agreements. Consequently, the Court enjoined Martin Marietta's unsolicited takeover bid for four months, which effectively ended its hostile bid.

Since *Vulcan*, parties have generally focused more closely on making clear the extent, if any, to which a confidentiality agreement should be interpreted to prevent a hostile bid by one of the parties. For example, potential acquirors will sometimes add language to a confidentiality agreement's standstill provision that expressly permits the acquiror, following the expiration or termination of the standstill period, to take some, or all, of the actions previously prohibited by the standstill notwithstanding any other restrictions contained in the confidentiality agreement. This is intended to deal with the use and disclosure restrictions, which do not typically terminate when the standstill does. Targets sometimes push back, or agree to a limited version of this construct.

Parties should also consider how confidentiality and use obligations may restrict a party in future M&A activity when a confidentiality agreement is or may be deemed to have been assigned to a third party after an acquisition. In 2015, a California court in *Depomed Inc.* v. *Horizon Pharma, PLC*[257] preliminarily enjoined a hostile bidder on the

ground that it misused information in violation of a confidentiality agreement, effectively ending the hostile takeover attempt. Unlike in *Vulcan*, the confidentiality agreement at issue was not signed directly between the parties that ultimately became involved in litigation. In 2013, Horizon, while pursuing a co-promotion arrangement concerning a drug asset owned by Janssen Pharmaceuticals, Inc., signed a confidentiality agreement with Janssen containing customary provisions limiting Horizon's permitted use of Janssen proprietary information solely to evaluating Horizon's interest in pursuing a business relationship with Janssen. Without signing a new confidentiality agreement, Horizon later participated in an auction process that Janssen ran for the drug asset. Depomed also participated, winning the auction and acquiring the U.S. rights to the drug asset. Two years later, Horizon launched a hostile bid for Depomed, which sued for injunctive relief, asserting that Horizon was improperly using information relating to the drug asset (purchased from Janssen) in evaluating and prosecuting its hostile bid. In a ruling applying the plain terms of the agreement, the court rejected arguments that the confidentiality agreement only applied to the earlier co-promotion transaction structure. The court concluded that it was likely that Depomed had acquired from Janssen the right to enforce the confidentiality restrictions against Horizon, noting that "a different conclusion would be illogical as it would mean that Depomed could not protect the confidential information" about its newly acquired asset.[258] The court held that Horizon had misused confidential information in formulating its takeover proposal, and Horizon withdrew its bid the following day. *Depomed* is a further reminder that parties should generally be aware of the obligations contained in confidentiality agreements, especially where assignment, including as a result of a transaction involving the party protected by the confidentiality agreement, can transform the nature of the original obligation and cause unanticipated limitations on future strategic opportunities.

Other typical provisions in confidentiality agreements may also have far-reaching consequences for the parties to a potential transaction. For example, a party providing confidential information often insists that the confidentiality agreement contain broad disclaimer and non-reliance language making clear that the providing party has not made any representation or warranty to the receiving party as to the accuracy or completeness of the information provided, and that the providing party will not have any liability to the receiving party arising from the use of the information. Delaware courts have enforced broad disclaimer and non-reliance language that effectively allocates to the potential buyer the risk that information provided by the potential seller (and not otherwise warranted by the potential seller) may be inaccurate, even in the case of allegations of fraud.[259] Other important provisions to focus on include restrictions on solicitation and hiring of employees, co-bidding arrangements, financing sources, limits on disclosure of the transaction process and details, legally required disclosures, termination provisions, return and destruction of confidential information, remedies for breach and application of the confidentiality agreement to the parties' affiliates, advisors or representatives.

Certain types of prospective acquirors also typically include provisions that are specific to the characteristics and circumstances of that type of acquiror. For example, SPAC bidders typically include a provision in which the target company waives any right

to make any claim against the property held in the SPAC's trust account. Target companies often provide that this waiver excludes any right to pursue a claim against assets held outside the trust account, including any funds that are released from the trust account, or for specific performance. Some parties have also added a provision permitting claims against the SPAC following a de-SPAC merger, when the SPAC will have the assets of the target company. Private equity bidders often include provisions specific to their structure, such as an acknowledgment that the private equity fund may explore transactions with competitors and a provision that states that their portfolio companies will not be bound by the confidentiality agreement solely by virtue of investment professionals at the private equity fund serving on the board of directors of such portfolio companies (so called "dual hat" individuals). Companies should be wary of broadly-drafted provisions that undermine the confidentiality and use restrictions in the confidentially agreement, such as a broad carveout stating that nothing in the confidentiality agreement will restrict investments in competitors, or overly narrow provisions limiting applicability of the agreement to only certain affiliates that actually receive confidential information from the seller. In addition, companies should be mindful of whether a private equity bidder is considering acquiring the target as a new portfolio company, or as an acquisition by one of its existing portfolio companies, which should inform what provisions may be appropriate in the confidentiality agreement.

2. Letters of Intent

Another type of preliminary agreement is the letter of intent, sometimes referred to as a "memorandum of understanding" or "MOU." Letters of intent are more common in private transactions than in public company deals, although it is not uncommon even in public deals for parties to negotiate term sheets, which are similar in that they spell out the most critical terms of a proposed transaction but are typically unsigned.

Whether to negotiate a letter of intent or proceed straight to definitive documentation depends on the facts in each case. Letters of intent can serve several purposes at the outset of negotiations, including demonstrating both parties' commitment to the possible transaction, establishing a time frame for executing definitive agreements, creating a period of exclusivity of negotiations, creating confidentiality obligations, allocating responsibility for expenses, and serving as a form of preliminary documentation for third parties requesting it (such as lenders). A letter of intent can also be used to make a Hart-Scott-Rodino antitrust filing, so as to commence the requisite waiting period, even if the letter of intent is not binding. For certain types of more complicated private transactions, such as structured investments or joint ventures, which involve lengthy negotiations and complex issues, the parties may benefit from term sheets (which are generally unsigned) to define the relationship before proceeding to drafting the documentation. While letters of intent can be useful to identify any deal-breakers early on in negotiations, saving the parties from unfruitful expenditure of time and money, they can also take time to negotiate (increasing the possibility of leaks), may impact the dynamics between the parties, and can raise disclosure issues in the case of public companies or Schedule 13D filers.

Even when executed by the parties, most provisions of a letter of intent are non-binding, although some provisions are expressly intended to be binding (for example, the grant of an exclusivity period or an expense reimbursement or confidentiality provision). It is essential that the parties are clear as to whether, and to what extent, a letter of intent is intended to be binding and enforceable.[260] Because they are cursory in nature, letters of intent typically state that the parties will only be bound upon execution of definitive agreements. The absence of such language could lead a court to hold the letter of intent enforceable. For example, the Delaware Court of Chancery ruled in a 2009 bench decision that a jilted bidder had asserted colorable claims that a target had breached the no-shop/exclusivity and confidentiality provisions of a letter of intent, as well as its obligation to negotiate in good faith.[261] In reaching its decision, the Court stated that parties that wish to enter into non-binding letters of intent can "readily do that by expressly saying that the letter of intent is non-binding," and that contracts "do not have inherent fiduciary outs"—points that practitioners representing sellers should keep in mind from the outset of a sale process.[262]

Even where express language that a letter of intent is non-binding is present, there may be other facts and circumstances that could lead a court to determine that the way the letter of intent is used makes it binding. In *SIGA Technologies, Inc.* v. *PharmAthene, Inc.*, SIGA and PharmAthene negotiated a licensing agreement term sheet (the "LATS") that was unsigned and had a footer on both pages stating "Non-Binding Terms."[263] The LATS was later attached by the parties to a merger agreement and a loan agreement, both of which provided that if the merger agreement was terminated, the parties would nevertheless negotiate a licensing agreement in good faith in accordance with the terms of the LATS. After terminating the merger agreement, SIGA claimed that the LATS was non-binding and attempted to negotiate a licensing agreement with economic terms "drastically different and significantly more favorable to SIGA"[264] from those in the LATS. The Delaware Supreme Court affirmed the Delaware Court of Chancery's finding, ruling that the incorporation of the LATS into the merger agreement reflected that the parties had agreed to an enforceable commitment to negotiate in good faith.[265]

Parties that do not wish to be bound by provisions of a letter of intent or term sheet should avoid statements or actions that may indicate that a letter of intent or term sheet was understood by the parties to be binding. If maximum flexibility and clarity is desired, parties should also consider expressly disclaiming an obligation to negotiate in good faith and making clear that negotiations may be terminated without liability at any time until a definitive agreement has been executed.

B. Choice of Sale Process: Auctions and Market Checks

A merger transaction may impose special obligations on a board. Every transaction is different, and courts have recognized that a board should have significant latitude in designing and executing a merger process. As the Delaware Supreme Court has several times reiterated, there is "no single blueprint" that directors must follow in selling a company.[266] This is true even if *Revlon* applies: directors are not guarantors that the best price has been obtained, and Delaware case law makes clear that "[n]o court

can tell directors exactly how to accomplish that goal [of getting the best price in a sale], because they will be facing a unique combination of circumstances, many of which will be outside their control."[267] Thus, *Revlon* "does not . . . require every board to follow a judicially prescribed checklist of sales activities."[268] Rather, the board has reasonable latitude in determining the method of sale most likely to produce the highest value for the shareholders. As a result, even in a change-of-control setting, a board may determine to enter into a merger agreement after an arm's-length negotiation with a single bidder, as opposed to putting the company up for auction or canvassing the market, if it determines in good faith that a single-bidder strategy is the most desirable. Even after a competitive bidding process has begun, a board may, under proper circumstances, favor one bidder over another "if in good faith and advisedly it believes shareholder interests would be thereby advanced."[269] In demonstrating that it pursued the best price reasonably available, it is generally necessary for the board to be able to point to some form of "market check," whether active or passive.

1. Auction

In an auction, prospective acquirors are asked to make a bid for a company by a fixed deadline, in one or several "rounds" of bidding. A company, usually with the assistance of an investment banker, may prepare a descriptive memorandum, known as a "confidential information memorandum" or an "offering memorandum" (or just a short "teaser" since, in a public company sale, the material information is already public) that is circulated to prospective bidders. Prior to the bidding deadline, a company will typically send a draft transaction agreement and related documentation (such as draft disclosure schedules or a draft transition services agreement or other ancillary agreements), along with a bid process letter setting forth the auction process, to multiple parties. The draft transaction agreement often has multiple forms depending on the types of bidders participating in the process. For example, a company may have a transaction agreement for strategic acquirors, a transaction agreement for financial acquirors and a transaction agreement for SPAC acquirors. Differences between the forms typically relate to financing provisions and remedies. Interested bidders are allowed to engage in due diligence (subject to entering into a confidentiality agreement) and then submit their bids, together with any comments on the draft transaction agreement and related documentation. An auction often has more than one round, usually with only certain bidders getting invited to subsequent rounds, and sometimes involves simultaneous negotiations by the target with more than one bidder. In subsequent rounds, bidders often get greater access to sensitive confidential information and are encouraged to revise their bids.

A significant advantage of an auction is that it can be effective even if there is only one bidder remaining. Absent leaks, a bidder has no way of being certain whether there are other bidders, creating an incentive for the bidder to put forward its best bid. In addition, the seller in an auction can negotiate with one or more bidders to try to elicit higher bids. An auction may be conducted openly (typically by announcing that the company has hired an investment bank to "explore strategic alternatives") or conducted

without an announcement. Even without an announcement, however, it is difficult to conduct an auction without rumors of a sale leaking into the marketplace. The risk of publicity highlights one of the key disadvantages of an auction, which is that a "failed" auction can cause damage to relationships with employees, customers, suppliers and other stakeholders. Companies may also engage in a limited or "mini-auction," in which only the most likely bidders are invited to participate. One difficulty in any auction process is that the true "value" of a bid, which, under *Revlon*, as described in Section II.B.2.a.2, should take into account not only the price to be paid but also the likelihood and timing of consummation and the related financing and regulatory approval risks, may be difficult to discern with certainty. However, just as the Delaware courts have respected the need for boards to make difficult judgments about the extent and nature of the sales process, so too have they respected reasonable decisions by boards to factor considerations of certainty and timing into their assessments of what bid offered most value. Additionally, some bidders may propose stock or part-stock deals, which implicate considerations regarding valuation and pricing mechanisms, as further discussed below in Section IV. The optimal sale process to be employed depends on the dynamics of the particular situation and should be developed in close consultation with financial and legal advisors.

2. Market Check

An alternative to the auction technique is a "market check," whereby the seller gauges other potential buyers' interest without conducting a formal bidding process. A market check may be preferable to an auction for a number of reasons, including a reduced likelihood of leaks and a shortened and less onerous negotiating process. A seller may also forgo an auction because it determines that an auction is unlikely to yield other serious bids or because the seller strategically accedes to an attractive bidder's refusal to participate in an auction. It is important to note that a seller may appropriately conclude, depending on the circumstances, that it should negotiate only with a single bidder, without reaching out to other potential bidders pre-signing. A market check may occur either before or after the signing of a merger agreement, and may be active (also known as a "go-shop") or passive.

a. Pre-Signing Market Check

In a pre-signing market check, a company, usually through its financial advisors, attempts to determine which parties may be interested in acquiring the company and makes some approach to these companies to gauge potential interest. A pre-signing market check may effectively occur even if not initiated by the company, for example, when there are public rumors that the company is seeking an acquiror or is the subject of an acquisition proposal. Such rumors may encourage potential acquirors to privately approach the board of directors of the company "in play." The absence of such approaches in the face of rumors provides some evidence to a board of directors that there may not be other interested parties waiting in the wings.

b. Post-Signing Market Check

In a post-signing market check in the public company setting, provisions in the merger agreement provide an opportunity for other bidders to make competing offers after execution of the agreement.[270] An advantage of a post-signing market check is that it ensures that the seller may secure the offer put forth by the first bidder while leaving the seller open to considering higher offers. Acquirors, of course, will typically seek to limit the post-signing market check and will negotiate for so-called "deal protections" such as a "no-shop" covenant, which restricts the seller's ability to solicit or discuss alternative transactions, and termination or "break-up" fees, in the event that the initial transaction is not consummated due to the emergence of a superior proposal. Another customary "deal protection" provision is a matching right, which allows the initial bidder an opportunity to match any higher bid that may be made. For a post-signing market check to be effective, potential bidders must be aware of the opportunity to bid, have sufficient information and time to make a bid, and not be unduly deterred by unreasonable break-up fees or deal protections afforded to the first bidder.

Post-signing market checks may either be active or passive. In an active market check, the merger agreement permits the seller to actively seek out new bidders—through a so-called "go-shop" provision discussed further in Section III.B.2.c. In a passive market check, the merger agreement includes a "no-shop" provision prohibiting the active solicitation of alternative bids, but also includes a "fiduciary out" permitting the target board to consider higher unsolicited bids and change its recommendation or, in many cases, terminate the agreement with the first bidder to enter into a transaction with an interloper who has made a superior proposal. Because of the "no-shop" provision and the "fiduciary out," new bidders must take the first step of declaring their interest after hearing about the transaction.

A board may discharge its fiduciary duties by selling a company through a single-bidder negotiation coupled with a post-signing, passive market check, even in a *Revlon* transaction. Although this method is more likely to be closely scrutinized by courts, it is permissible so long as the board is informed of the downsides of this approach and has an appropriate basis for concluding that they are outweighed by the benefits, and the transaction provides sufficient opportunity for competing bids to emerge. In 2011, Vice Chancellor Parsons ruled in *In re Smurfit-Stone* that an active market check was unnecessary because the selling company had been "in play" both during and after its bankruptcy, yet no competing offers were made.[271] Similarly, in the *Fort Howard* case in 1988, which was reaffirmed by the Delaware Supreme Court in *C&J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' Ret. Trust* in 2014, Chancellor Allen ruled that the company's directors had satisfied their fiduciary duties in selling the company by negotiating for an approximately month-and-a-half-long period between the announcement of the transaction and the closing of the tender offer in which new bidders could express their interest.[272] The Chancellor ruled that the market check was not "hobbled" by deal protection measures and noted that he was "particularly impressed with the announcement [of the transaction] in the financial press and with the rapid and full-hearted response to the eight inquiries received."[273]

The Delaware Court of Chancery has provided valuable guidance for sellers considering forgoing an active market check. In *In re Plains*, Vice Chancellor Noble found that the directors were experienced in the industry and had "retained 'significant flexibility to deal with any later-emerging bidder and ensured that the market would have a healthy period of time to digest the proposed transaction.'"[274] When no competing bids surfaced in the five months after the merger was announced, the Plains board could feel confident it had obtained the highest available price. In contrast with *Plains*, in *Koehler* v. *NetSpend*, Vice Chancellor Glasscock criticized the NetSpend board's failure to perform a market check, given the other facts surrounding the merger.[275] NetSpend's suitor entered into voting agreements for 40% of the voting stock and bargained for customary deal protections in the merger agreement, including a no-shop, a 3.9% termination fee and matching rights. The merger agreement also prohibited the NetSpend board from waiving "Don't Ask, Don't Waive" standstills that NetSpend had entered into with two private equity firms that had previously expressed an interest in investing in the company, but had not been part of a pre-signing auction or market check. Even though the record showed that the investment bank advising NetSpend's board had advised that a private equity bidder was unlikely to match the buyer's offer, Vice Chancellor Glasscock found that, by agreeing to enforce the "Don't Ask, Don't Waive" standstills, the NetSpend board had "blinded itself" to the two most likely sources of competing bids and, moreover, had done so without fully understanding the import of the standstills.[276] This, combined with reliance on a "weak" fairness opinion and an anticipated short period before consummation, led Vice Chancellor Glasscock to conclude that the sales process was unreasonable.[277] *Plains* and *NetSpend* reinforce that the terms of a merger agreement and its surrounding circumstances will be viewed collectively, and, in the *Revlon* context, the sales process must be reasonably designed to obtain the highest price.

c. Go-Shops

Delaware courts have generally found active market checks, more commonly known as "go-shop" provisions, to be a reasonable, but not mandatory, approach to satisfying *Revlon* duties.[278] Go-shop provisions offer buyers (often financial buyers) the benefit of avoiding an auction and the assurance of a break-up fee if a deal is topped, which is usually an acceptable outcome for financial buyers. On the other hand, a go-shop enables a company being sold to "lock-in" an acceptable transaction without the risks of an auction, while mitigating the potentially heightened fiduciary concerns that can arise in such deal settings. These provisions allow the target to solicit competing offers for a limited time period (typically 25 to 50 days) after signing an acquisition agreement—permitting the target during that interval to, in the words of then-Vice Chancellor Strine, "shop like Paris Hilton."[279] Go-shop provisions often provide for a lower break-up fee (often half the fee that would apply after the go-shop period) if the agreement is terminated to accept a superior proposal received during the go-shop period.

Some acquirors do not necessarily welcome go-shops not only because they have heightened sensitivity to encouraging competitors to become interlopers, but because their interest in the target is strategic, meaning that receiving a break-up fee is usually a suboptimal outcome. However, strategic deals have also seen some tailored variations on

go-shop provisions, such as carving out pre-existing bidders from the no-shop provision and providing for a reduced break-up fee with respect to deals pursued with these bidders, or just generally coupling a no-shop with a lower break-up fee for a specified period of time.

When a go-shop provision is employed, it is important that there be an active solicitation. Confidentiality agreements should be signed and requisite information should be made available to qualified competing bidders who emerge, even though they may be competitors and the buyer and management may not want to provide sensitive information to them. In rare cases, where there is suspicion that the seller's investment bank may have an incentive to support the transaction with the original buyer because of relationships or because they are providing financing for the transaction (which can raise its own conflict concerns), it may be appropriate to bring in another bank to run the go-shop process.[280] Though go-shop provisions can be an effective form of satisfying a board's fiduciary duties through an active post-signing market check, some critics have noted that they seldom result in higher bids.

C. Board Reliance on Financial Advisors as Experts

The board, in exercising its business judgment as to the appropriate form and valuation of transaction consideration, may rely on experts, including investment bankers, in reaching an informed view. In Delaware, Section 141(e) of the DGCL provides protection from personal liability to directors who rely on appropriately qualified advisors. A board is entitled to rely on the expert advice of the company's financial advisors "who are selected with reasonable care and are reasonably believed to be acting within the scope of their expertise," as well as on the advice and analyses of management.[281] In merger transactions, an investment banker's unbiased view of the fairness of the consideration to be paid and the related analyses provide a board with significant information with which to evaluate a proposed transaction. Since Delaware's 1985 *Smith* v. *Van Gorkom* decision, it has been common in a merger transaction involving a public company for a fairness opinion to be rendered to the board of the seller (and, sometimes, to the buyer). The analyses and opinions presented to a board, combined with presentations by management and the board's own long-term strategic reviews, provide the key foundation for the exercise of the directors' business judgment.[282] Courts reviewing the actions of boards have commented favorably on the use by boards of investment bankers in evaluating merger and other transaction proposals (although generally receipt of a fairness opinion by independent investment bankers is not required as a matter of law).[283] In transactions subject to the federal proxy rules, the SEC staff also requires detailed disclosure of the procedures followed by an investment banker in preparing a fairness opinion, including a summary of the financial analyses underlying the banker's opinion and a description of any constraints placed on those analyses by the board. The additional detailed disclosure obligations of Rule 13e-3 under the Exchange Act, which applies to "going private" transactions between issuers and their affiliates, also means that reports, opinions and appraisals materially related to the Rule 13e-3 transaction prepared by outside financial advisors in such transactions should be

prepared with the understanding that they may be required to be disclosed to the SEC and publicly filed.

Particularly in situations where target directors are choosing among competing common stock (or other non-cash) business combinations, a board's decision-making may be susceptible to claims of bias, faulty judgment and inadequate investigation of the relative values of competing offers. Because the stock valuation process inherently involves greater exercise of judgment by a board than that required in an all-cash deal, consideration of the informed analyses of financial advisors is helpful in establishing the fulfillment of the applicable legal duties.

In a stock-for-stock fixed exchange ratio merger, the fairness of the consideration often turns on the relative contributions of each party to the combined company in terms of revenues, earnings and assets—not the absolute dollar value of the stock being received by one party's shareholders based on its trading price at a particular point in time. Parties to a stock-for-stock merger customarily opt to sign a merger agreement based on the fairness of the exchange ratio at the time of signing, without a bring-down. This structure enhances the probability of consummating the merger by not giving either party a right to walk away if the fairness opinion would otherwise have changed between signing and closing.

Great care should be exercised by investment bankers in preparing the analyses that support their opinions and in the presentation of such analyses to management and the board, and boards should exercise care in determining what analyses to disclose in proxy or tender offer materials. Recent decisions indicate that the scope of potential liability under the federal securities laws and Delaware law for disclosure violations may be broader than previously thought. In April 2018, the U.S. Court of Appeals for the Ninth Circuit ruled that in the tender offer context, Section 14(e) of the Exchange Act does not require scienter for violation, but rather a lower standard of negligence.[284] This ruling arose in the context of a buyout of a public company by tender offer, where a shareholder class action alleged that the failure by the target to include a summary of its investment bank's comparable transaction premium analysis was a material omission that violated Section 14(e). By contrast, the Second, Third, Fifth, Sixth and Eleventh Circuits have held that Section 14(e) requires a showing of scienter. In January 2019, the U.S. Supreme Court granted certiorari on the Ninth Circuit holding and its deviation from the holdings of the other Circuits, but then dismissed the writ of certiorari as being improvidently granted in April 2019, leaving a circuit split. In Delaware, the Delaware Court of Chancery found in *In re PLX Technology Inc. Stockholders Litigation* that the board breached its fiduciary duty by failing to disclose in its proxy materials the results of a discounted cash flow analysis commissioned by a special committee of the board that was otherwise partially described in the proxy materials; specifically, the proxy materials discussed how the special committee had requested a discounted cash flow analysis, which had been received and discussed by the board, but the proxy materials did not disclose the actual results of the discounted cash flow analysis.[285] The Delaware Court of Chancery found that although the omitted information may not have been independently

material, once the proxy materials disclosed that an analysis was performed, the omission of the results of the analysis was a misleading partial disclosure.[286]

More generally, financial advisor analyses disclosed in proxy statements are regularly the target of plaintiff lawsuits; plaintiffs will often file such suits after the company's initial filing of its preliminary proxy statement, alleging that the disclosures in the proxy statement are materially false or misleading, or material information is omitted. In response, the company typically issues supplemental disclosures to moot such claims, usually involving a settlement with the plaintiffs for a monetary sum, or the plaintiffs may seek mootness fees from the court. In 2019, the United States District Court for the District of Delaware denied contested mootness fee applications in two lawsuits challenging supplemental disclosures relating to, among other things, discounted cash flow analyses and multiples used in comparable companies analyses. The plaintiffs had argued that the financial advisor-related disclosures were materially misleading, in response to which the company filed supplemental disclosures. The plaintiffs argued that without their original lawsuits, the supplemental disclosures would not have been made, but since such disclosures substantially benefited the target's stockholders, they were entitled to fees as a result. The Court found that the supplemental disclosures were not material, so there was no substantial benefit of having made the disclosures such that the plaintiffs were not entitled to fees.[287] However, as discussed in Section I.B.7, disclosure-based litigation based on federal securities laws has become common and the overwhelming majority of such federal suits are settled and "mooted" by the issuance of supplemental disclosures and payments of the stockholder plaintiffs' lawyers' fees.

The wording of the fairness opinion and, as illustrated by these cases, the scope of related proxy statement and tender offer disclosures must be carefully drafted to accurately reflect the nature of the analyses underlying the opinion and the assumptions and qualifications upon which it is based.[288]

D. Financial Advisor Conflicts of Interest

It is important that banks and boards take a proactive role in encouraging the disclosure and management of actual or potential conflicts of interest both at the board level and among the board's advisors. In recent years, there has been a significant focus on financial advisor conflicts. As noted in *In re El Paso*, banks should faithfully represent their clients and disclose fully any actual or potential conflicts of which they are aware so that such conflicts can be managed appropriately.[289]

1. Identifying and Managing Financial Advisor Conflicts of Interest

Though boards cannot know every conflict their financial advisors may have, they should seek to ensure that these conflicts are brought to light as they arise throughout the transaction process, and to appropriately manage any such conflicts. These steps are vital to banks and boards avoiding liability from banker conflicts and failed disclosure. In the absence of disclosure and management of conflicts, among other results, a board may be

found to have breached its fiduciary duty, the deal could be delayed, and deal protections could be compromised.

Courts and the SEC will scrutinize perceived conflicts of interest by the investment bank rendering the fairness opinion. Since 2007, FINRA's rules have required specific disclosures and procedures addressing conflicts of interest when member firms provide fairness opinions in change-of-control transactions.[290] FINRA requires disclosure in the fairness opinion as to, among other things, (1) whether or not the fairness opinion was approved or issued by a fairness committee, (2) whether or not the fairness opinion expresses an opinion regarding the fairness of the amount or nature of the compensation to be received in such transaction by the company's officers, directors, employees or class of such persons, relative to the compensation to be received in such transaction by the shareholders, (3) whether the compensation that the member firm will receive is contingent upon the successful completion of the transaction, for rendering the fairness opinion and/or serving as an advisor, (4) whether any other significant payment or compensation is contingent upon the completion of the transaction and (5) any material relationships that existed during the past two years or that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to the transaction that is the subject of the fairness opinion.[291] Disclosure about previous relationships between the investment banker and the parties to the transaction is also required.

The Delaware courts have also had a voice in deciding what constitutes a conflict of interest on the part of financial advisors to a transaction. For example, although FINRA does not ban the practice of contingent fee arrangements for financial advisors, in some circumstances, certain contingent fee arrangements will cause Delaware courts to find triable issues of bias. In *In re Tele-Communications, Inc. Shareholders Litigation*, the Court held that the fact that the fairness opinion rendered by a special committee's financial advisor was given pursuant to a contingent fee arrangement—$40 million of the financial advisor's fee was contingent on the completion of the transaction—created "a serious issue of material fact, as to whether [that advisor] could provide independent advice to the Special Committee."[292] Although certain contingent fee arrangements in specific factual contexts have been questioned by the Delaware courts, contingent fee arrangements generally "ha[ve] been recognized as proper by [the] courts,"[293] as they "provide an incentive for [the investment bank] to seek higher value."[294] Companies on the buy-side should be sensitive to contingent payments based on a percentage of the transaction value; the financial advisor's larger fee at a higher transaction price could be misaligned with the company's goal of acquiring the target at the lowest possible price.

The role of managing conflicts of interest is not limited to investment banks, and oversight over potential conflicts is within the scope of a board's fiduciary duties. In an important decision concerning the role played by outside financial advisors in the board's decision-making process, the Delaware Court of Chancery held in 2011 that a financial advisor was so conflicted that the board's failure to actively oversee the financial

advisor's conflict gave rise to a likelihood of a breach of fiduciary duty by the board. In *In re Del Monte Foods Co. Shareholders Litigation*,[295] the Court found that after the Del Monte board had called off a process of exploring a potential sale, its investment bankers (1) continued to meet with several of the bidders—without the approval or knowledge of Del Monte—ultimately yielding a new joint bid from two buyout firms, (2) sought and received permission to provide financing to the bidders for a substantial fee before the parties had reached agreement on price and (3) ran Del Monte's go-shop process. The Court faulted the board and bankers for the foregoing actions and stated that, although "the blame for what took place appears at this preliminary stage to lie with [the bankers], the buck stops with the Board," because "Delaware law requires that a board take an active and direct role in the sale process."[296] The case ultimately settled for $89 million, with the investment bank bearing roughly a quarter of the cost. In 2014, in *In re Rural Metro Corp. Stockholders Litigation*,[297] the Delaware Court of Chancery found that Royal Bank of Canada aided and abetted fiduciary duty violations of the board of directors of Rural/Metro Corporation in its sale of the company to a private equity firm. The Court noted that, while negotiating on behalf of the board, RBC never disclosed to the Rural board that RBC was lobbying the private equity firm to allow RBC to participate in buy-side financing. RBC was found to have failed to disclose certain critical information to the board and the Court concluded that "RBC knowingly participated in the Board's breach of its duty of care by creating the informational vacuum that misled the Board," in part, by revising its valuation of Rural downward so as to make it appear that the private equity firm's offer was fair to and in the best interests of Rural's shareholders.[298]

In 2015, the Delaware Supreme Court affirmed the Delaware Court of Chancery's ruling in *Rural Metro*, but emphasized that its holding was "a narrow one that should not be read expansively to suggest that any failure on the part of a financial advisor to prevent directors from breaching their duty of care gives rise to a claim for aiding and abetting a breach of the duty of care"[299] and provided clarification on the practical steps boards and their financial advisors can take to manage potential conflicts.[300] The Court accepted the practical reality that banks may be conflicted, but put the onus on directors to "be especially diligent in overseeing the conflicted advisor's role in the sale process"[301] and explained that "because the conflicted advisor may, alone, possess information relating to a conflict, the board should require disclosure of, on an ongoing basis, material information that might impact the board's process."[302]

Financial advisors' conflicts based on relationships with sellers or acquirors may be "more subtle, but no less self-interested."[303] In *Firefighters' Pension System of the City of Kansas City* v. *Presidio, Inc.*, the plaintiff alleged that Presidio's financial advisor LionTree favored a sale of the company to BC Partners to the detriment of a competing bid from Clayton Dubilier & Rice. The plaintiff's principal alleged defect in the transaction process was that, during a go shop period following the signing of a merger agreement with BC Partners, LionTree "tipped" the terms of a topping bid from CD&R to BC Partners, allowing BC Partners to strategically increase its bid by only $0.10 per share and ultimately consummate the transaction. Vice Chancellor Laster found that it

was reasonably conceivable that LionTree had steered the Board toward a quick transaction with BC Partners due to several factors: (i) LionTree's existing relationships with BC Partners, (ii) the fact that Apollo Global Management, the controlling shareholder of Presidio, allegedly preferred a near-term sale, and (iii) that CD&R intended to replace Presidio's CEO, with whom LionTree had developed a relationship, whereas BC Partners intended to retain him. As Vice Chancellor Laster hypothesized, "Pushing for a competitive process involving CD&R might earn LionTree a little more money in the short run through its contingent fee, but it would not serve LionTree's interests in the long run. If CD&R won the bid, then the Company would have a new owner, a new management team, and no incumbent relationship with LionTree. Meanwhile, people with whom LionTree had existing relationships would be disappointed."[304] Presidio's board did not receive any disclosures regarding LionTree's potential conflicts of interests and relationships with Apollo and BC Partners until nearly a month after it had been running point on the transaction and a week after the board had reached an agreement on price with BC Partners. Moreover, LionTree's alleged "tip" to BC Partners was not disclosed to Presidio's board or stockholders until after the litigation was commenced and Vice Chancellor Laster found that the tip "cast[] a dim light on the sale process as a whole" by hindering an active bidding contest.[305] While recognizing that, absent LionTree's conduct, the sale process would otherwise have fallen within a range of reasonableness, Vice Chancellor Laster found that it was reasonable to infer that the board's actions fell outside the range of reasonableness because the Board based its decisions on information that was shaped by LionTree's conflicts of interest and failed to provide active and direct oversight of LionTree.[306] This case shows the importance of full disclosures by financial advisors to the board of potential conflicts of interest early in a transaction process. Companies should include outside deal counsel in the review of financial advisor engagement letters and disclosures to the board to ensure that the board is fully informed.

Del Monte, *Rural Metro* and *Presidio* are examples of cases where, based on the records before them, the courts found serious improper behavior by the investment banks. Such cases have been rare and, moreover, the Delaware Court of Chancery has ruled, and the Delaware Supreme Court has affirmed, that a fully informed stockholder vote may effectively insulate a financial advisor from aiding and abetting liability, just as it may insulate directors.[307] In *Singh* v. *Attenborough*, the Delaware Supreme Court upheld the dismissal of claims that investment bankers had aided and abetted the directors of Zale Corporation in an alleged breach of fiduciary duty in connection with the sale of the company. Amplifying its 2015 ruling in *Corwin* v. *KKR Financial*[308] (addressing "aiding-and-abetting" claims against corporate advisors), the Court held that, with the exception of a claim for waste, when a merger is approved by an informed body of disinterested stockholders and then closes, the business judgment rule applies, further judicial examination of director conduct is generally inappropriate, and "dismissal is typically the result."[309]

Citing both *Corwin* and *Singh* v. *Attenborough*, the Delaware Court of Chancery, as affirmed by the Delaware Supreme Court, has since dismissed aiding and abetting

claims against a financial advisor where there was no underlying breach of fiduciary duties by the board of directors.[310] So, too, has the Delaware Court of Chancery dismissed an aiding and abetting claim against a financial advisor who had passive awareness that its client's disclosures had material omissions, where the client itself was also aware of that information. The Court stated that "[a] general duty on third parties to ensure that all material facts are disclosed, by fiduciaries to their principals, is … not a duty imposed by law or equity."[311] A "passive failure" by a financial advisor to ensure adequate disclosure to stockholders "without more," does not give rise to aiding and abetting liability.[312] These decisions affirm that Delaware provides corporate advisors with "a high degree of insulation from liability by employing a defendant-friendly standard that requires plaintiffs to prove scienter and awards advisors some measure of immunity from due-care liability."[313]

2. Public Disclosure of Financial Advisor Conflicts of Interest

A key aspect of managing financial advisor conflicts is ensuring adequate public disclosure of such conflicts as required by law. It is well established under Delaware law that "[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives," Delaware courts require "full disclosure of investment banker compensation and potential conflicts."[314] In 2017, the Court preliminarily enjoined a special meeting of stockholders in connection with a merger, where it found that the acquiring company's board breached its fiduciary duties by failing to disclose in a "clear and transparent manner" its financial advisor's potential financial interests in the merger.[315] The Court's ruling stated, "[a] stockholder should not have to go on a scavenger hunt to try to obtain a complete and accurate picture of a financial advisor's financial interests in a transaction."[316] The failure to disclose material information, such as LionTree's alleged "tip" in *Presidio*, will lead Delaware courts to reject *Corwin* cleansing.[317] That said, if information pertaining to a potential conflict is clearly disclosed in a proxy statement, recommendation statement or similar document, even if not done in great detail, this may suffice to prevent liability. For example, the Delaware Court of Chancery ruled that a recommendation statement adequately disclosed a potential conflict of interest between the seller's financial advisors and a bidder when it disclosed that the financial advisor had performed past work for the bidder, even though the disclosure only generally described such work and did not disclose specific fee amounts.[318] Another case in 2019 found a similar result for not only past, but also ongoing conflicts: the Delaware Court of Chancery dismissed plaintiffs' claim based on the failure to disclose the specific nature of services a financial advisor may provide in the future to the target, as well as expected fee amounts, ruling that such information was not necessary in providing stockholders with sufficient information to assess the conflict.[319]

In addition to state law requirements, in 2016 the SEC issued guidance related to disclosure of financial advisor fees in solicitations involving equity tender offers, a transaction structure often used to effect M&A transactions. The guidance provides that the board of a target company must disclose a summary of the material terms of the compensation of the target's financial advisor in its solicitation/recommendation

statement. A generic disclosure saying the financial advisor is being paid "customary compensation" is not ordinarily enough—the disclosure must be sufficient to permit shareholders to evaluate the advisor's objectivity. The guidance provides that such disclosure would generally include the types of fees payable, contingencies, milestones or triggers relating to the fees, and any other information that would be material to a shareholder's assessment of the financial advisor's analyses or conclusions, including any material incentives or conflicts.[320] Similarly, where a company receives a fairness opinion from a financial advisor that is referred to in the proxy statement or prospectus, the company must describe any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between the financial advisor and its affiliates, on the one hand, and the subject company or its affiliates, on the other hand.[321] This disclosure will describe the compensation to be received by the financial advisor in connection with the transaction.

E. Use and Disclosure of Financial Projections

Financial projections are often prepared by the management of the target company (or of both companies in a stock-for-stock deal) and can play a critical role in the decision-making process of both the acquiror and target boards with respect to the amount and nature of consideration. These projections may also serve as the foundation for certain analyses supporting a fairness opinion given by a financial advisor. Despite their usefulness, the creation of and reliance on financial projections may trigger certain disclosure obligations under both Delaware law and SEC rules. Failing to understand and follow the disclosure requirements may result in costly shareholder litigation claiming that the company's disclosure to shareholders was inadequate and misleading, which could lead to delay in completing a transaction.

As it did in the *Netsmart* decision, the Delaware Court of Chancery often requires disclosure of management projections underlying the analyses supporting a fairness opinion.[322] Courts have also indicated that partial or selective disclosure of certain projections can be problematic.

Not all projections will be deemed sufficiently material or reliable as to require proxy disclosure. Nor is the mere receipt or review of certain projections by parties or advisors to a transaction enough to require disclosure.[323] For one thing, the development of financial projections is an iterative process, which often involves deliberation between the board (or special committee), the financial advisors and management as to which assumptions are reasonable. Additionally, financial projections often contemplate a base case, an upside case and a downside case, not all of which are necessarily material and required to be disclosed.[324] As explained in *In re Micromet, Inc. Shareholders Litigation*, "Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information."[325]

In *In re BEA Systems, Inc. Shareholders Litigation*, the plaintiffs argued that certain financial data considered by BEA's financial advisor had been presented to the board and thus had to be disclosed.[326] The Delaware Court of Chancery found that neither the financial advisor nor the board considered the contested data reliable or actually relied upon that data in forming their views on valuation and that the information did not have to be disclosed, noting that disclosure of such unreliable information "could well mislead shareholders rather than inform them."[327] The *BEA* case indicates that Delaware courts have not imposed *per se* disclosure standards for financial projections or other aspects of a financial advisor's work; case-specific materiality is the touchstone for disclosure. The Delaware Court of Chancery reiterated this view in *Saba Software*, stating that "the omission from a proxy statement of projections prepared by a financial advisor for a sales process rarely will give rise to an actionable disclosure claim."[328] The Court also found on a separate occasion that the failure to disclose projections that the financial advisor "ostensibly did not rely on," such as a supplemental analysis that concerned only a small fraction of the company's estimated revenues, was not material.[329]

Not only is the decision of whether and what projections to include a consideration under Delaware law, but so too is how they are characterized if disclosed. In October 2018, the Delaware Court of Chancery in *In re PLX Technology Inc. Stockholders Litigation* found that a board breached its fiduciary duty by mischaracterizing projections that were prepared specifically in connection with an acquisition, by characterizing them as being made in the ordinary course of business for operating purposes.[330] In a different context, in 2019 the Delaware Court of Chancery rejected disclosure challenges raised by plaintiffs claiming that financial projections "understated the Company's upside and overstated certain risk factors" in comparison to more optimistic statements publicly made during investor conference calls and in a published article. In finding that the projections were not inconsistent (the Court found them to still be generally favorable), and thus not materially false or misleading, the Court made clear there is some leeway to have projections and public statements be different, especially when the context of the public statements (such as puffery or discussion of post-closing plans and prospects) justify the difference.[331]

The SEC also imposes its own disclosure requirements in transactions subject to the proxy rules. While the SEC is receptive to arguments that certain projections are out of date or immaterial, it is normally the company's burden to persuade the SEC that projections that were provided to buyers should not be disclosed. There can be significant consequences for non-disclosure, including cease-and-desist actions in certain situations where a company misleads investors about the future financial performance of the company, such as through divergence between a company's own private model indicating underperformance and its subsequent public statements affirming the company's previous projections that proved to be inaccurate. Companies should take care that their projections are carefully prepared, thorough and include an appropriate measure of caution. In light of the timing pressure facing many transactions, where even a few weeks' delay may add unwanted execution risk, companies may preemptively

disclose projections that they would have otherwise kept private. Such preemptive efforts help accelerate the SEC review process and also help to minimize the likelihood that a successful shareholder lawsuit will enjoin a transaction pending further disclosure found to be required by a court. Nevertheless, a company must avoid including so many figures in its disclosure so as to be confusing or misleading to shareholders.

Delaware law and the views of the SEC staff on how much disclosure to require (both of target projections and, in the case of transactions involving stock consideration, buyer projections) continue to develop. For example, in October 2017, the SEC staff released guidance providing that financial measures included in projections provided to financial advisors for the purpose of rendering an opinion related to a business combination transaction that are being disclosed in order to comply with law are not non-GAAP financial measures and do not require GAAP reconciliation, potentially in response to an increasing amount of frivolous litigation claims that such projections must be reconciled under Regulation G.[332] And in April 2018, the SEC staff released guidance to confirm that the foregoing exemption applies if (1) the forecasts provided to financial advisors are also provided to boards or board committees, or (2) a company determines that disclosure of material forecasts provided to bidders is needed to comply with federal securities laws, including anti-fraud provisions.[333] In addition, in light of the recent increase in the number of SPAC transactions, statements made by the Acting Director of the Division of Corporate Finance in April 2021 suggested that the SEC may consider additional rules regarding the PSLRA's application to SPAC transactions, including with respect to projections that are contained in the Form S-4 for a SPAC transaction.[334] The PSLRA's safe harbor for forward-looking statements does not apply to statements that are "made in connection with an initial public offering."[335] Currently, SPAC transactions are not understood by most practitioners to be an "initial public offering" for purposes of the PSLRA and therefore the PSLRA's safe harbor is considered to apply to SPAC Form S-4s. However, a change to this interpretation may subject projections contained in the Forms S-4 for SPAC transactions to an increased risk of private securities lawsuits and liability. As the rules and law regarding disclosure of projections are fact-specific and evolving, companies should consult with their legal and financial advisors well in advance of a filing to ensure that they are well informed as to how to strike the delicate balance between under- and over-disclosure in this area.

IV.

Structural Considerations

A. Private Deal Structures

Although this outline generally focuses on takeovers of public companies, transactions involving private targets, including the sale of a subsidiary or business by a public company, make up a significant portion of global M&A deal activity. A sale of a private company or business can involve the sale of assets, stock or a combination of both, or may be effected through a merger, a spin-off combined with a merger or a joint venture.

Various considerations may make one form of acquisition structure preferable to another. For example, the acquisition of the stock of an entity results in all of the entity's assets and liabilities being indirectly held by the acquiror. In some cases, the parties do not wish to (or are not able to) transfer the entity that holds the target business to the acquiror (for instance, because the relevant assets, employees and liabilities are housed in several entities, which may also hold assets, employees and liabilities unrelated to the target business) and, instead, provide for specified assets and liabilities associated with the target business to be transferred. The choice of transaction structure typically will have tax ramifications and may affect which governmental or contractual consents may be required for the transaction.

1. Basic Structures

There are significant differences between deals involving public and private company targets, as well as important considerations that are unique to deals with private company targets. For example, transactions involving private company targets potentially can be consummated more quickly than transactions involving public company targets because a private target can typically be acquired without having to hold a shareholder meeting subject to the federal proxy rules. In addition, many private company transactions have a single owner or concentrated shareholder base, enabling the acquiror to "lock up" the deal at signing by obtaining all requisite stockholder consents to the transaction in connection with entry into the transaction agreement. Where a private company is being acquired without any need for post-signing target shareholder approval, there typically would not be any "fiduciary-out" or "change in recommendation" provisions of the type discussed in Section V.A.3. Not only does this structure reduce the time needed to close a deal by eliminating the post-signing shareholder approval process, but it also increases deal certainty by eliminating interloper risk.

Although public mergers and acquisitions often have a handful of bespoke issues arising from the particular circumstances involved, their terms and conditions tend to have less variation than private deals, due to expectations of boards and shareholders of public company targets. For example, asset purchase agreements, unlike public company merger agreements, typically include provisions defining which assets and liabilities are

included in the sale and which are excluded, which allows the parties greater ability to customize the transaction (for instance, the parties can provide for all liabilities relating to the target business to transfer, including historical liabilities, or can provide for target to retain the historical liabilities—a so-called "our-watch, your-watch" construct). In addition, private company acquisition agreements sometimes include purchase price adjustments tied to the target business' level of cash, debt and/or working capital at closing or other specifically negotiated adjustments (such as adjustments related to taxes), whereas public company merger agreements typically do not provide for any purchase price adjustments. Furthermore, while it is very rare for public company target acquisition agreements to feature contingent consideration that would be payable post-closing, private company acquisition agreements include with greater frequency (although still in a minority of cases) earn-outs providing for additional consideration to be possibly paid after closing. Private company acquisition agreements also may include post-closing covenants, such as non-competition or employee non-solicitation provisions, whereas covenants in public company agreements generally terminate at closing. Where the acquiror is purchasing less than 100% of the equity of a private company, the parties will need to consider the governance and other terms of their ongoing relationship as shareholders of the target company, which raises a myriad of additional issues to be negotiated. These issues may include board representation, veto rights, preemptive rights, put/call rights, transfer restrictions, liquidity events, tag/drag-along rights, registration/exit rights and/or information rights, among others, depending on the circumstances.

2. Indemnification and Representation and Warranty Insurance

One fundamental difference between private and public company acquisition agreements is that private M&A agreements often contemplate post-closing recourse, whether through indemnification or representation and warranty ("R&W") insurance as discussed below, while public company agreements do not. One reason for this distinction is simply practicality: in an acquisition of a private company or business (including the acquisition of a division or a group of assets from a public company), an acquiror may be able to seek recourse from the sellers post-closing in the event of a breach of the agreement. By contrast, in a public company acquisition, the public target has dispersed ownership and there is no identifiable party from which recourse for breaches of the agreement could realistically be obtained post-closing. Furthermore, unlike the acquiror of a public company, the acquiror of a private company does not have the benefit of presumptively reliable public disclosures being made by the target under the federal securities laws. The difference in the degree of information available about public and private companies leads both to a greater need for post-closing recourse for the acquiror of a private company, as well as greater negotiation of the precise wording of representations and warranties in private company acquisition agreements, along with the related disclosure schedules. In a private transaction where there is doubt about the credit quality of the seller or the selling entity's intent to continue operating rather than distributing its assets to a dispersed group of owners (against whom recourse may be

difficult), private acquisition agreements may provide for an escrow as security for indemnification obligations.

In recent years, there has been a steady upswing in the use of R&W insurance, which provides coverage for breaches of representations and warranties in purchase agreements. Data on private M&A transactions is somewhat difficult to track, but studies have shown that in recent years at least 50% of private North America transactions used R&W insurance, up from only 29% in 2016 to 2017.[336] In addition, the number of R&W insurance brokers and insurers has significantly increased, allowing clients to receive several different proposals before selecting a primary carrier. While the rise of R&W insurance cannot be attributed to a single factor, the use and attractiveness of such policies has grown as: transaction parties and their advisors have become more comfortable using R&W insurance to supplement or replace indemnification obligations in an acquisition agreement; policy forms have become more standardized; additional insurers have entered the space, leading to a more competitive underwriting environment; the process of obtaining a policy has become more streamlined, with a shorter timeline; insurance coverage has become increasingly available in transactions exceeding $1 billion; and carriers have been willing to proceed without the seller having any "skin in the game," in the form of an indemnity obligation. In addition, as the number of R&W insurance claims have increased in recent years (commensurate with the increased use of the product), R&W insurers have overwhelmingly demonstrated that they will honor claims; indeed, to date, there have been very few disputes between insureds and insurers regarding claims under R&W insurance policies.

The use of R&W insurance has become an attractive structural solution for both sellers and acquirors. From the perspective of a seller, R&W insurance can facilitate a clean exit from a business without post-closing contingent liabilities or holdback of the purchase price. While R&W insurance has become commonplace in strategic transactions (indeed, brokers have estimated that approximately 40-50% of policies involved "corporates" as sellers), R&W insurance can be especially attractive for private equity sellers, where any type of post-closing contingent liability or holdback (i.e., in the form of potential indemnification obligations) can create structural challenges and friction in a fund's relationship with its limited partners. Private equity sellers of portfolio companies have been increasingly successful in requiring buyers to accept limited or no post-closing indemnification so they may safely and quickly distribute deal proceeds to their limited partners—a position that has been facilitated by the expanding availability and use of R&W insurance. At the same time, from the perspective of an acquiror, R&W insurance provides a reliable source for reimbursement for breaches other than a seller, especially where the seller is not an optimal source of indemnification due to credit risks or future plans with respect to the sale proceeds. Additionally, an acquiror usually can obtain a longer survival period for representations and warranties (typically three years of coverage for general representations and six or seven years of coverage for tax representations and fundamental representations that address core concepts such as title, authorization, and capitalization) and more robust coverage from an insurance carrier than it might otherwise receive from a seller. Given the increased availability and

market familiarity with R&W insurance, sellers now often insist that prospective acquirors obtain R&W insurance in lieu of post-closing seller indemnification; likewise, prospective acquirors sometimes substitute R&W insurance for post-closing indemnification to enhance the attractiveness of their bids. In addition to negotiating whether R&W insurance will be used in lieu of post-closing indemnification, parties also negotiate who will bear the cost of the R&W insurance premium and the policy deductible (known in the R&W insurance space as the retention).

To be sure, R&W insurance is neither identical to target indemnities, nor a panacea. There are certain inherent costs associated with purchasing R&W insurance (*e.g.*, premium costs and insurers' diligence costs). In fact, 2021 saw a significant increase in the pricing of R&W insurance premiums, reducing in certain circumstances the attractiveness of the R&W insurance product as compared to other sources of post-closing recourse.[337] Additionally, some carriers may not participate in certain sectors or geographic locations perceived by such carriers as higher risk, which may limit the overall level of coverage available and competition over pricing and terms. In addition, although increasingly more streamlined, the process for purchasing R&W insurance, including a review of the acquiror's due diligence by the insurance carrier and negotiating policy wording with the insurance carrier, takes time and effort. In some instances, certain insurers have stated that they lack sufficient manpower or available capacity to quote R&W insurance on certain deals. While brokers and insurers alike can move with alacrity and put a policy in place in a compressed period of time, doing so generally requires the acquiror to have not only completed an in-depth diligence review of the target across multiple functions, but to be prepared to respond to a series of questions and follow-up questions across multiple business areas.

Additionally, R&W insurance policies do not cover covenant breaches, and carriers exclude all representation and warranty breaches known by the acquiror's "deal team" (typically three to five key members of the acquiror's due diligence team) at the time of binding coverage (typically the signing of the transaction), even if such item was not included in the disclosure schedule to the transaction agreement. Knowledge is typically defined as actual conscious awareness both of a particular fact and that the fact constitutes a breach, and typically does not include imputed or constructive knowledge or a duty of inquiry. Carriers may also seek to exclude from coverage matters for which they believe the risk of a claim is too high or not sufficiently diligenced, in which case acquirors may wish to obtain protection against such risks in the form of a special indemnity from the target. For instance, environmental liabilities (such as those relating to asbestos or polychlorinated biphenyls (PCBs)) and certain pension liabilities are often automatic exclusions from R&W insurance policies, whether the liabilities are known or unknown. Moreover, R&W insurers have recently focused on increased diligence, and sometimes exclusions, in such areas as privacy and cybersecurity, employment classification and certain tax matters. A carrier's review of the acquiror's due diligence process and findings impact the exclusions that the carrier may seek to exclude. A robust diligence process by the acquiror can aid in eliminating specific exclusions by demonstrating to the carrier that the acquiror has uncovered all material issues in any area

of concern. Careful review and negotiation of the drafting of exclusions from coverage is key to ensure that acquirors understand which risks they have coverage for, either through insurance or indemnification, and which risks they will bear.

Looking ahead, while R&W insurance has thus far been used nearly exclusively in private deals, it might become more readily available in public transactions.[338] However, because the insurers would generally have no subrogation rights (even with respect to fraud) in a public company transaction, the underwriters would be even more insistent on the scope of both the acquiror's diligence and the disclosure schedules, and might seek certain additional exclusions from coverage. Similarly, the nature and scope of public company disclosures and SEC filings might result in certain limited variations to R&W insurance policies in the public company R&W insurance context.

B. Public Deal Structures

Where the target of an acquisition is a public company, the legal form of the transaction is similarly a critical initial structuring consideration. The legal structure may have important consequences for the deal, including the tax treatment of the transaction, the speed at which the transaction will be completed and the potential transactional litigation risks. Parties to a transaction should be mindful of the consequences of the transaction structure they select.

Public acquisitions typically take the form of (i) a one-step merger or (ii) a two-step tender offer, which is a tender offer for shares of the target company followed by a second-step "squeeze-out" merger where all remaining shares are acquired. The decision to choose one structure over another is generally informed by timing, regulatory considerations, tax, financing requirements and other tactical considerations.

A one-step merger is a creature of state statutes that provides for the assumption of all of the non-surviving entities' assets and liabilities by the surviving entity. A merger is effectively the acquisition of all assets and an assumption of all liabilities of one entity by another, except that, in a merger, the separate legal existence of one of the two merger parties ceases upon consummation of the merger by operation of law. A statutory long-form merger with a public target typically requires the target's shareholders to vote on the merger proposal at a shareholder meeting after the preparation (and potential SEC review) of a proxy statement. Most commonly, statutory mergers are structured so that the constituent entities to the merger are the target and a subsidiary of the acquiror (a so-called "triangular" merger), in lieu of the acquiror directly participating. A forward triangular merger involves the target merging with and into a subsidiary of the acquiror, with the subsidiary as the surviving entity. A reverse triangular merger involves a subsidiary of the acquiror merging with and into the target, with the target as the surviving entity. Choosing a merger structure is a deal-specific decision that is primarily driven by income tax considerations and sometimes by concerns relating to whether anti-assignment and change-of-control provisions in critical contracts may be triggered if one form is chosen over the other.[339] The requirements for tax-free

treatment of forward triangular mergers and reverse triangular mergers, as well as certain other transaction structures, are discussed in Section IV.C.6.

A two-step transaction involves a public tender offer in which the acquiror makes a direct offer to the target's public shareholders to acquire their shares, commonly conditioned on the acquiror acquiring at least a majority of the target's common stock upon the close of the tender offer. In cases where, upon consummation of the offer, the acquiror holds at least the statutorily prescribed percentage (typically 90% for a short-form merger, or a majority in the case of a transaction effected pursuant to Section 251(h) of the DGCL, as discussed below) of each class of target stock entitled to vote on the merger, the acquiror can complete the acquisition through a merger without a shareholder vote promptly following consummation of the tender offer,[340] thereby avoiding the need to incur the expense and delay of soliciting proxies and holding a shareholders' meeting to approve the second-step merger.

1. Considerations in Selecting a Merger vs. a Tender Offer Structure

a. Speed

Depending on the circumstances, a tender offer structure can lead to a transaction being completed faster than a long-form merger. This is because the shareholder vote contemplated by a merger requires the filing, and potential review by the SEC, of a proxy statement, followed by a shareholder solicitation period. In contrast, a tender offer statement for an all-cash tender offer can usually be mailed to shareholders within a week of the parties reaching agreement, and any SEC review is typically conducted during the tender offer period (which is required to be a minimum of 20 business days under the federal securities laws).[341] Additionally, amendments to the tender offer rules reduced the timing disparity between all-cash tender offers and tender offers with consideration including securities (or "exchange offers") by allowing the 20-business day time period for exchange offers to begin as early as upon initial filing of a registration statement, rather than upon effectiveness of the registration statement following SEC review. If an acquiror commences an exchange offer on the basis of an initial registration statement, the SEC typically will endeavor to work with an offeror to clear the registration statement in time for the exchange offer to be completed within 20 business days of commencement, although this outcome is not assured. As a result, absent any requisite third-party approvals or regulatory concerns, a tender offer can result in time savings.

However, a two-step structure involving a tender offer is not always preferable to or faster than a one-step merger; the decision of which structure to employ must be made in light of the particular circumstances of the transaction. For example, in a transaction that involves a lengthy regulatory approval process, a tender offer would have to remain open until the regulatory approval was obtained, and if the tender offer did not result in the acquiror holding sufficient shares to effect a short-form "squeeze-out" merger, additional time would be needed to complete the back-end merger structure. By comparison, a one-step merger would permit the parties to obtain shareholder approval during the pendency of the regulatory process, and then close the transaction promptly

after obtaining regulatory approval. An acquiror may prefer a one-step merger in this circumstance, as fiduciary-out provisions in a merger agreement typically terminate upon shareholder approval, while a tender offer remains subject to interloper risk and the risk that market changes make the offer less attractive to target shareholders so long as the tender offer remains open. In addition, if there is a possibility of a time gap between the closing of the tender offer and the closing of the second-step merger, the tender offer structure poses financing-related complications—albeit ones that have been manageable in most instances—because financing for the tender offer will be needed at the time of its closing, before the acquiror has access to the target's balance sheet (the Federal Reserve Board's margin rules restrict borrowings secured by public company stock to 50% of its market value). Finally, the length of time between signing and closing a one-step merger may depend on the type of consideration. In many cases, the SEC recently has declined to review and provide comments on all-cash merger proxy statements. The likelihood that the SEC will not review an all-cash merger proxy statement may change the calculus of whether to structure an all-cash deal as a one-step merger or a two-step tender offer, by decreasing the delay between signing and closing of all-cash mergers.

b. Dissident Shareholders

Another potential advantage of the tender offer structure is its relative favorability in most circumstances in dealing with dissident shareholder attempts to "hold up" friendly merger transactions. The tender offer structure may be advantageous in overcoming hold-up obstacles because:

(1) tender offers do not suffer from the so-called "dead-vote" problem that arises in contested merger transactions when the holders of a substantial number of shares sell after the record date and then either do not vote or change an outdated vote;

(2) ISS and other proxy advisory services only occasionally make recommendations or other commentary with respect to tender offers because there is no specific voting or proxy decision, making it more likely for shareholders to tender based on their economic interests rather than to vote based on ISS's views (which may reflect non-price factors); and

(3) recent experience indicates that dissident shareholders may be less likely to try to "game" a tender offer than a merger vote, and therefore the risk of a "no" vote (*i.e.*, a less-than-50% tender) may be lower than for a traditional voted-upon merger.

c. Controller Transactions

As discussed in Section II.C.2, transactions with a controlling shareholder are typically subject to entire fairness review. A line of Delaware authority—beginning with the 2001 decision in *In re Siliconix Inc. Stockholders Litigation*—however, indicated that business judgment review should apply where a majority stockholder acquired the shares it did not already own via a tender offer followed by a short-form merger if the bidder was able to obtain ownership above 90% of the company in the tender offer so long as the tender offer was not the product of coercion or faulty disclosures.[342] Later decisions

from the Delaware Court of Chancery expressly criticized the *Siliconix* line of cases and held that such a tender-offer/short-form-merger structure could only be considered non-coercive if the offer were conditioned on (1) the affirmative recommendation of a special committee of independent directors and (2) non-waivable majority-of-the-minority shareholder tender condition.[343] As discussed in Section II.D.2, the Delaware Supreme Court held in 2014's *Kahn* v. *M&F Worldwide Corp.* that going-private transactions would be subject to business judgment review if similarly conditioned on independent committee and minority stockholder approval.[344] Although the *M&F Worldwide* court did not discuss *Siliconix*, no court has applied *Siliconix* in the wake of *M&F Worldwide*.[345]

2. Delaware Facilitates Use of Tender Offers: Section 251(h)

Before Delaware adopted Section 251(h) in 2013 to facilitate the use of tender offers, a second-step merger following a tender offer for a Delaware corporation always required a shareholder vote—even if the outcome was a formality because the acquiror owned enough shares to single-handedly approve the transaction—unless the acquiror reached Delaware's short-form merger 90% threshold. Despite the inevitability of the vote's outcome, the extended process of preparing a proxy statement and holding a meeting would impose transaction risk, expense and complexity on the parties. The prospect of delay was significant deterrent to the use of tender offers, especially by private equity acquirors, which typically need to acquire full ownership of the target in a single step to facilitate their acquisition financing.

DGCL Section 251(h) permits the inclusion of a provision in a merger agreement eliminating the need for a shareholder vote to approve a second-step merger following a tender offer under certain conditions—including that following the tender offer the acquiror owns sufficient stock to approve the merger pursuant to the DGCL and the target's charter (*i.e.*, a majority of the outstanding shares, unless the target's charter requires a higher threshold or the vote of a separate series or class).[346] The provision also requires that (i) the merger agreement permits or requires that the merger be effected under Section 251(h), (ii) the offer extend to any and all outstanding voting stock of the target (except for stock owned by the target itself, the acquiror, any parent of the acquiror (if wholly owned) and any subsidiaries of the foregoing); (iii) all non-tendering shares receive the same amount and type of consideration as those that tender; and (iv) the second-step merger be effected as soon as practicable following the consummation of the offer.

Subsequent amendments to Section 251(h) clarified that, for purposes of determining whether sufficient shares were acquired in the first-step tender offer, shares tendered pursuant to notice of guaranteed delivery procedures cannot be counted by the acquiror toward the threshold until the shares underlying the guarantee are actually delivered. Amendments exempting "rollover stock" from the requirement that all non-tendering shares receive the same amount and kind of consideration as those that tender may increase the appeal of two-step structures to private equity acquirors—which sometimes seek to have target management roll over some or all of their existing equity

in connection with an acquisition to further align the management team's incentives with those of the acquiror post-acquisition. Rollover stock is also counted toward satisfaction of the requirement that the acquiror own sufficient shares following completion of the tender offer to approve the second-step merger in situations where rollover stock is exchanged following completion of the tender offer.

Another development favoring the use of Section 251(h) to effect an acquisition is a 2016 decision of the Delaware Court of Chancery, *In re Volcano Corp.*,[347] which held that the first-step tender of shares to the acquiror in a Section 251(h) transaction "essentially replicates [the] statutorily required stockholder vote in favor of a merger in that both require approval—albeit pursuant to different corporate mechanisms—by stockholders representing at least a majority of a corporation's outstanding shares to effectuate the merger."[348] Accordingly, the standard of review for a Section 251(h) transaction, which is also known as a "medium form" merger, will be the business judgment rule, where a majority of a company's fully informed, disinterested and uncoerced stockholders tender their shares, providing *Corwin* protections in the tender offer context. The decision makes clear that using the two-step structure under Section 251(h) does not, by itself, cause a target board to lose the benefit of a business judgment standard of review that could be obtained through receipt of a stockholder vote in a long-form merger. *Volcano* therefore suggests that tender offers under Section 251(h) will not deprive the target board of the litigation benefits of fully informed stockholder approval.

3. Methods of Dealing with Tender Offer Shortfalls

Before the adoption of Section 251(h), several workarounds were sometimes used to deal with the possibility that a tender offer would result in the acquisition of sufficient shares to (eventually) approve a second-step merger, but not reach the 90% threshold needed for a short-form merger: the top-up option, dual-track structure and subsequent offering period. Although Section 251(h) has significantly diminished the prominence of these workarounds by eliminating in applicable transactions the need to reach the 90% threshold, they remain relevant because Section 251(h) may not always be available or optimal for the parties. For instance, not all states have adopted a provision similar to Section 251(h) and therefore it would not be available for targets that are not incorporated in Delaware or another state that has adopted a provision similar to Section 251(h). Section 251(h) is likewise unavailable if the target's charter expressly requires a shareholder vote on a merger or if the target's shares are not publicly listed or held by more than 2,000 holders.

a. Top-Up Options

To address the burden of the 90% threshold, the market evolved a workaround in the form of the top-up option. Such an option, exercisable after the close of the tender offer, permits the acquiror to purchase a number of newly issued shares directly from the target so that the acquiror may reach the short-form merger statute threshold, thereby avoiding a shareholder vote and enabling an almost immediate consummation of the transaction. Critically, a top-up option is limited by the amount of authorized but

unissued stock of the target, which may prevent the target from issuing sufficient stock for the acquiror to reach the short-form merger threshold. As a technical matter, issuances of greater than 20% of outstanding shares pursuant to a top-up option would likely violate stock exchange rules that require shareholder approval prior to such issuance, but such rules do not limit such issuances in practice since the punishment for such violation would be de-listing and the target would otherwise be de-listed at the closing of the acquisition.

b. Dual-Track Structures

A number of years ago, some private equity firms began using a dual-track approach that 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 number of shares upon which it is conditioned—which in combination with the shares issued pursuant to a top-up option would allow for a short-form merger—the parties would already be well along the path to a shareholders' meeting for a fallback long-form merger (it should be noted that while the SEC will begin review, it will not declare the proxy statement effective until after the expiration of the tender offer). Examples of this approach include 3G Capital/Burger King, Bain Capital/Gymboree and TPG/Immucor.

Although dual-track tender offers are now infrequently employed as a result of Section 251(h), dual-track structures continue to be potentially useful, especially in cases where the target is incorporated outside of Delaware. In addition, some strategic transactions have employed a dual-track approach where there is uncertainty at the outset as to whether regulatory hurdles, such as an antitrust "second request," will involve a lengthy process that could subject an acquiror in a tender offer to prolonged interloper risk. 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); if not, the shareholder vote can be taken on the long-form merger route, thereby reducing interloper risk.

c. Subsequent Offering Periods

SEC rules permit a bidder in a tender offer to provide for a subsequent offering period if, among other requirements, the initial offering period of at least 20 business has expired, the bidder immediately accepts and promptly pays for all securities tendered during the initial offering period, and the bidder immediately accepts and promptly pays for all securities as they are tendered during the subsequent offering period. This gives a bidder a second opportunity to reach 90% if it does not reach that threshold by the end of the initial offering period; once shareholders see that the bidder has acquired sufficient shares in the initial offer to ultimately approve a second-step merger, they may choose to tender into the subsequent offering period rather than wait until that merger is completed. Of course, there is no assurance that providing a subsequent offering period necessarily will result in reaching the 90% threshold.

4. Mergers of Equals

Combinations between public companies of similar sizes are often referred to as "mergers of equals," or "MOEs," although the term does not describe a distinct legal transaction structure or have a universally agreed meaning in the market. Nonetheless, some general characteristics of MOEs can be described. MOEs are typically structured as tax-free, stock-for-stock transactions, with a fixed exchange ratio without collars or walk-aways, and with a balanced contract often containing matching representations, warranties and interim covenants from both parties. In addition, MOEs tend to raise certain "social" issues that are not typically debated by the parties in situations where there is a clear acquiror and target. As described below, key social issues in MOEs include the identity of the CEO of the combined company, the composition of the combined board, the identity of the chairman, the location of the combined company's headquarters and the combined company's name.

MOEs often provide little or no premium above market price for either company. Instead, an exchange ratio is set to reflect one or more relative metrics, such as assets, earnings and capital contributions, or market capitalizations of the two merging parties—typically, but not always, resulting in a market-to-market exchange. Assuming a proper exchange ratio is set, MOEs can provide a fair and efficient means for the shareholders of both companies to benefit because the combined company can enhance shareholder value through merger synergies at a lower cost than high-premium acquisitions.

Due to the absence or modesty of a premium to market price, however, MOEs are particularly vulnerable to shareholder dissatisfaction and competing bids. As a preliminary matter, it is important to recognize that the period of greatest vulnerability is the period before the transaction is signed and announced. Parties must be cognizant that leaks or premature disclosure of MOE negotiations can provide an opening for a would-be acquiror to submit a competing proposal or pressure a party into a sale or an auction; such leaks can also encourage shareholders to pressure one or both companies into abandoning the transaction before it is ever signed or the parties have had an opportunity to fully and publicly communicate its rationale to the market. A run-up in the stock price of one of the companies—whether or not based on merger rumors—also can derail an MOE, because no company wants to announce a transaction with an exchange ratio that reflects a discount to market. MOE agreements generally include robust structural protections, such as break-up fees, support commitments, no-shops and "force the vote" provisions, which prevent the parties from terminating the merger agreement in the face of a competing offer without giving the shareholders an opportunity to vote on the merger. Once the deal has been made public, it is critical to advance a strong business rationale for the MOE in order to obtain a positive stock market reaction and thus reduce both parties' vulnerability to shareholder unrest. The appearance and reality of a true combination of equals, with shareholders sharing the benefits of the merger proportionately, are essential to winning shareholder support in the absence of a substantial premium.

Achieving the reality and perception of a true combination of equals presents an MOE transaction with unique structural and governance challenges. Structurally, the companies may choose to have both companies' stock surrendered and a new company's stock issued in their place to, among other possible benefits, promote the market's understanding of the transaction as a true combination of equals, rather than a takeover of one company by the other. This is sometimes accomplished using a "double dummy" or "top hat" merger structure, in which both merger parties become subsidiaries under a new holding company. However, as with all mergers, no structure should be selected without a careful analysis of its impact on "change of control" provisions in each company's debt, equity plans and other contracts, shareholder vote requirements and tax considerations for each company. Similarly, parties to an MOE should carefully consider the post-merger governance and management of the combined company. Among the issues that will need to be addressed are the combined company's name, the location of the combined company's headquarters and key operations, the rationalization of the companies' separate corporate cultures and the selection of officers and directors. In most of the larger MOEs, there has been substantial balance, if not exact parity, in board representation and a "best athletes" approach among senior executive officers. This approach allows for a selection of the best people from both organizations to manage the combined company, thereby enhancing long-term shareholder value. For example, the CEO of one company may become the executive chairman, while the other CEO continues as CEO of the combined company, thus providing for representation at the helm from both constituent companies. Occasionally, but rarely, some MOEs have even utilized co-CEO structures.

5. Rule 13e-3 "Going Private" Transactions

Another consideration when structuring a public deal involving affiliated parties is Rule 13e-3 under the Exchange Act, which imposes significant additional disclosure obligations on the parties to so-called "going private" transactions. "Going private" transactions are ones in which the issuer or affiliates of the issuer purchase the issuer's equity securities (including by way of a merger, tender offer or other business combination transaction) and as a result any class of the issuer's equity securities becomes eligible for deregistration. Over the years, including in the context of Rule 13e-3 transactions, the SEC has taken a broad view of persons that come within the scope of the "affiliate" definition, attributing "control" to directors, members of senior management, material stockholders and other parties with significant rights to exert influence over an issuer (*e.g.*, with the power to designate members of the board or material contractual consent rights). Moreover, the SEC has taken the view that—even in a transaction where an unaffiliated third party is the purchaser—there are various factors which can still subject the transaction to Rule 13e-3, including when members of the target issuer's management would hold a material amount of the equity securities of the surviving company (or otherwise "control" the surviving company) following the closing.[349] An important general exemption to the application of Rule 13e-3 exists for transactions in which the consideration consists entirely of publicly traded common stock or other equity securities with substantially the same rights as the target's equity.

Rule 13e-3 is intended to provide greater transparency and protection to the non-affiliated shareholders in potential conflict transactions, which it accomplishes by requiring enhanced public disclosures relative to those that apply in a typical business combination not involving purchases by affiliates of the issuer. These disclosures include, among other things, an affirmative statement by the acquiror, each affiliate and the issuer as to whether the acquiror, affiliate or issuer, respectively, believes the going private transaction is fair to minority stockholders (with a detailed description of the factors underlying that conclusion), as well as extensive disclosure regarding any report, opinion or appraisal received by the acquiror or issuer from an outside party (other than the opinion of counsel) that is materially related to the transaction. Given these requirements, it is crucial that practitioners identify early in the transaction process whether the deal will or may be subject to Rule 13e-3, and, if so, be mindful that banker "board books" and other documents produced for any transaction party, even at a preliminary stage of transaction planning, may eventually become public based on the comprehensive disclosure requirements of Rule 13e-3.

C. Cash and Stock Consideration

The pricing structure used in a particular transaction (and the allocation of risk between the acquiror and the target and their respective shareholders) will depend on the characteristics of the deal and the relative bargaining strength of the parties. All-stock and part-stock mergers raise difficult pricing and market risk issues, particularly in a volatile market. In such transactions, even if the parties come to an agreement on the relative value of the two companies, the value of the consideration may be dramatically altered by market changes, such as a substantial decline in financial markets, industry-specific market trends, company-specific market performance or any combination of these. Although nominal market value is not the required legal criterion for assigning value to stock consideration in a proposed merger, a target in a transaction may have great difficulty in obtaining shareholder approval of a transaction where nominal market value is less than, or only marginally greater than, the unaffected market value of the target's stock. In addition, a stock merger proposal that becomes public carries substantial market risk for the acquiror, whose stock price may fall due to the anticipated financial impact of the transaction. Such a market response may put pressure on the acquiror to offer additional make-whole consideration to a target, worsening the impact of the transaction from an accretion/dilution perspective, or to abandon the transaction altogether.

In addition to considering the market risk of non-cash transaction consideration, parties often will prefer—and target companies (especially in competitive bidding situations) may require—their deal to avoid the closing risk associated with an acquiror shareholder vote, such as the vote required by both NYSE and Nasdaq listing rules upon an issuance of voting shares equal to 20% or more of an issuer's outstanding shares. For example, in 2019, Occidental Petroleum made several proposals to acquire Anadarko both before and after Anadarko signed a merger agreement with Chevron (which would not require any vote of Chevron's stockholders), each of which would have been

conditioned on approval of Occidental's stockholders and each of which was rejected by Anadarko. Ultimately, Anadarko terminated its merger agreement with Chevron and signed with Occidental only after Occidental improved its proposal by, among other things, increasing the cash component sufficiently to avoid any vote of Occidental's stockholders. Along similar lines, in 2020 WESCO ultimately succeeded in its topping bid to acquire Anixter, which had signed a deal with a private equity firm with committed financing and no required acquiror vote, by agreeing to pay with a mix of cash, common stock and shares in a new class of non-voting cumulative preferred stock such that no vote of WESCO's stockholders would be required. Additionally, WESCO utilized a "one-way cash-collar" that protected Anixter stockholders from up to a 20% decline in the value of WESCO common stock by "topping" them up for such a decline with additional cash.

1. All-Cash Transactions

The popularity of stock as a form of consideration ebbs and flows with economic conditions. All-cash bids have the benefit of being of certain value and will gain quick attention from a target's shareholders, particularly in the case of an unsolicited offer. In addition, the acquiror's stock price is often less adversely affected by an all-cash offer as compared to an all-stock offer because no shares of the acquiror are being issued. Of course, some bidders may not have sufficient cash and financing sources to pursue an all-cash transaction. In such cases, the relative benefits and complexities of part-cash/part-stock and all-stock transactions should be considered.

2. All-Stock Transactions

a. Pricing Formulas and Allocation of Market Risk

The typical stock merger is subject to market risk on account of the interval between signing and closing and the volatility of security trading prices. A drop in the price of an acquiror's stock between the execution of the acquisition agreement and the closing of the transaction can alter the relative value of the transaction to both acquiror and target shareholders: target shareholders might receive less value for their exchanged shares or, if additional shares are issued to compensate for the drop, the transaction will be less accretive or more dilutive to the acquiror's earnings per share. This market risk can be addressed by a pricing structure that is tailored to the risk allocation agreed to by the parties. These pricing structures may include using a valuation formula instead of a fixed exchange ratio, a collar, or, more rarely, the so-called "walk-away" provisions permitting unilateral termination in the event the acquiror's share price falls below a certain level. Companies considering cross-border transactions may also need to consider the impact of different currencies on the pricing structure. Currency risk raises similar issues to market risk and can amplify the market volatility factor inherent in all-stock transactions. Risks relating to deal consideration in cross-border deals are explored further in Section VII.C.

1. Fixed Exchange Ratio

The simplest, and most common, pricing structure (especially in the context of larger transactions) in a stock-for-stock transaction is to set a fixed exchange ratio at the time a merger agreement is signed. On the one hand, the advantage of a fixed exchange ratio for an acquiror is that it permits the acquiror to determine at the outset how much stock it will have to issue in the transaction (and thus to determine with some certainty the impact on per-share earnings and whether a shareholder vote may be required on such issuance pursuant to the rules of the applicable stock exchange). On the other hand, a fixed exchange ratio with a post-signing decline in the market value of the acquiror's stock could jeopardize shareholder approval and/or invite third-party competition (by decreasing the value that the target's shareholders will receive at closing). From an acquiror's perspective, these are often risks that can be dealt with if and when they arise, and the acquiror typically prefers the certainty of a fixed number of shares. To the extent an acquiror and a target are in the same industry, industry-specific events could very well affect their stock prices similarly and therefore not affect the premium to be afforded by the exchange ratio.

Even where the market moves adversely to the acquiror's stock, companies that are parties to pending strategic mergers have been able to successfully defend their deals based on the long-term strategic prospects of the combined company. Nevertheless, in cases where there is concern that shareholders may vote down a transaction because of price fluctuation, the parties may turn to other pricing mechanisms to allocate market risk.

2. Fixed Value with Floating Exchange Ratio; Collars

In many situations, one or both parties (typically the target) will be unwilling to permit market fluctuation to impair its ability to achieve the benefits of the bargain that was struck at signing. One solution is to provide for a floating exchange ratio, which will deliver a fixed dollar value of the acquiror's stock (rather than a fixed number of shares). The exchange ratio is set based on an average market price for the acquiror's stock during some period, normally 10 to 30 trading days, prior to closing. Thus, the acquiror would agree to deliver a fixed value (*e.g.*, $30) in stock for each of the target's shares, with the number of acquiror's shares to be delivered based on the market price during the specified period. An acquiror bears the market risk of a decline in the price of its stock since, in that event, it will have to issue more shares to deliver the agreed value. Correspondingly, an acquiror may benefit from an increase in the price of its stock since it could deliver fewer shares to provide the agreed value. Because a dramatic drop in the acquiror's stock may require the acquiror to buy its target for far more shares than had been intended at the time the transaction was announced (and may even trigger a requirement for a vote of the acquiror shareholders to authorize such issuance), companies should carefully consider the possibility of dramatic market events occurring between signing and closing. A target's shareholders bear little market risk in this scenario and correspondingly will not benefit from an increase in stock prices since the per-share value is fixed.

In order to mitigate the risk posed by market fluctuations, parties may desire a longer measuring period for valuing the acquiror's stock. Longer measuring periods minimize the effects of market volatility on how many acquiror shares will be issued as merger consideration. Additionally, acquirors favor longer measuring periods because, as the transaction becomes more likely and approaches fruition, the acquiror's stock may drop to reflect any anticipated earnings dilution. By contrast, a target may argue that the market price over a shorter period immediately prior to consummation provides a better measure of consideration received.

However, merely lengthening the valuation period is often insufficient to protect acquirors against large price declines. The number of shares that an acquiror may have to issue pursuant to a floating exchange ratio based upon the acquiror's stock price is limited only by the amount by which the stock price can decline. Consequently, acquirors must be cognizant of the fact that the price of their stock may decline precipitously based on events or circumstances having little or nothing to do with the value of the acquiror. While such declines may be only short-lived, the acquiror will still have to compensate the target for even a temporary shortfall that occurs during the measuring period for the floating exchange ratio. To protect against having to issue a very high number of shares, agreements with floating exchange ratios frequently include a "collar" that places a cap on the number of shares to be issued and, at the same time, a floor on the number of shares that may be issued. Effectively, these mechanisms provide upper and lower market price limits within which the number of shares to be delivered will be adjusted. If market prices go outside the range, no further adjustments to the number of shares delivered to the target's shareholders will need to be made. The size of the range determines the degree of protection afforded to the protected party and, correspondingly, the amount of the market risk borne by the other party's shareholders. Collars are typically, but not always, symmetrical in the level of price protection they provide to acquirors and targets.

The determination whether to negotiate for collar pricing or another price protection device depends on various factors, including:

- the parties' views on the potential impact from an accretion/dilution perspective of issuing additional shares and any potential timing consequences thereof (*i.e.*, if an increased share issuance would require a shareholder vote and delay closing);

- the overall prospects for share prices in the relevant industry;

- the relative size of the two companies;

- the parties' subjective market expectations over time; and

- the desirability or necessity of pegging the transaction price to a cash value.

Parties must also consider the anticipated effect on the acquiror's stock price of short selling by arbitrageurs once the transaction is announced. In some mergers, pricing formulas and collars are considered inadvisable due to the potential downward pressure on an acquiror's stock as a result of arbitrage trading.

3. Fixed Exchange Ratio within Price Collar

The fixed exchange ratio within a price collar is another formulation that may appeal to a target that is willing to accept some risk of a pre-closing market price decline in an acquiror's stock, but wishes to protect against declines beyond a certain point. In this scenario, the target's shareholders are entitled to receive a fixed number of shares of acquiror stock in exchange for each of their shares, and there is no adjustment in that number so long as the acquiror's stock is valued within a specified range during the valuation period (*e.g.*, 10% above or below the price on the date the parties agree to the exchange ratio). If, however, the acquiror's stock is valued outside that range during the valuation period, the number of shares to be delivered is adjusted accordingly (often to one of the endpoints of the range). Thus, for example, if the parties agree on a one-for-one exchange ratio and value the acquiror's stock at $30 for purposes of the transaction, they might agree that price movements in the acquiror's stock between $27 and $33 would not result in any adjustments. If, however, the stock is valued at $25 during the valuation period, the number of shares to be delivered in exchange for each target share would be 1.08, *i.e.*, a number of shares equal to $27 (the low end of the collar) based on the $25 valuation. Therefore, although the target's shareholders will not receive an increased number of shares because of the drop in the acquiror's stock price from $30 to $27, they will be compensated in additional acquiror shares by the drop in price from $27 to $25.

b. Walk-Aways

Another, far less common market-risk price protection is to include as a condition to closing the right for the target to walk away from the merger if the price of the acquiror's stock falls below a certain level. For example, a fixed exchange ratio walk-away provision could permit termination of a merger agreement by the target if, at the time the transaction is to close, the acquiror's stock has decreased by 15%—a single trigger.

While walk-away provisions are quite rare, they are sometimes found in all-stock bank deals. Generally, these provisions provide for a double trigger, requiring not only an agreed-upon absolute percentage decline in the acquiror's stock price, but also a specified percentage decline in the acquiror's stock price relative to a defined peer group of selected companies or a designated index of industry stocks during the pricing period. For example, the double-trigger walk-away may require that the acquiror's average stock price prior to closing fall (1) 15% or 20% from its price at the time of announcement and (2) 15% or 20% relative to a defined index of industry stocks. The double trigger essentially limits the walk-away right to market price declines specifically related to the acquiror, leaving the target's shareholders to bear the risk of price declines related to

industry events. That is, the acquiror may argue that if its stock does no more than follow a general market trend, there should be no right on the part of the target to "walk." Walk-away rights are generally tested during a short trading period prior to closing and often include an option for an acquiror to elect to increase the exchange ratio to avoid triggering the target's walk-away right.

The benefits of a walk-away, and the related components of a floating exchange ratio or a price collar, must be weighed carefully against the potentially significant costs of transaction uncertainty and the risk of non-consummation after months of planning for the combined company. In practice, walk-aways are extremely rarely employed.

c. Finding the Appropriate Pricing Structure for All-Stock Transactions

The pricing structure used in a particular all-stock transaction (and thus the allocation of market risk between an acquiror and a target and their respective shareholders) will depend on the characteristics of the transaction and the relative bargaining strength of the parties. A pricing structure used for one transaction may, for a variety of reasons, be entirely inappropriate for another. For instance, in a situation that is a pure sale, a target might legitimately request the inclusion of protective provisions such as a floating exchange ratio and/or a walk-away, especially if the target has other significant strategic opportunities. An acquiror may argue, of course, that the target should not be entitled to absolute protection (in the form of a walk-away) from general industry (compared to acquiror-specific) risks. A double-trigger walk-away can correct for general industry-wide events. At the other end of the spectrum, in an MOE or "partnership" type of transaction, claims on the part of either party for price protection, especially walk-aways, are less convincing. The argument against price protection is that, once the deal is signed, both parties' shareholders are (and should be) participants in both the opportunities and the risks of the combined company.

Because of the length of time required to complete some strategic acquisitions subject to high levels of regulatory scrutiny, the management of, or protection against, market risk through various price-related provisions can assume particular significance during stock-for-stock transaction negotiations. Blind adherence to precedent without an analysis of the particular circumstances of the transaction at hand can be disastrous, as can careless experimentation. Transaction participants should carefully consider the many alternative pricing structures available in light of the parties' goals and the various risks involved. In all events, and consistent with their fiduciary duties, directors need to be fully informed as to how any price adjustments work, and understand the issues presented by such provisions.

3. Hybrid Transactions: Cash and Stock

In certain circumstances, the use of a mixture of stock and cash as consideration is appealing. Targets may find mixed consideration desirable because the cash component provides them with some downside protection from a decline in the price of the

acquiror's stock. In addition, depending on the allocation procedure employed (*e.g.*, whether each target shareholder is permitted to select its mix of consideration), both short- and long-term investors may be able to receive their preferred consideration in the form of all cash or all stock. Those who choose not to cash out may be able to obtain the benefits of a tax-free exchange.

a. Possible Cash-Stock Combinations

There is a wide variety of potential pricing structures for a part-cash, part-stock transaction. Choosing the right pricing formula involves all of the complications raised in determining pricing formulas for an all-stock transaction (namely, the issues relating to fixed exchange ratios, floating exchange ratios, collars and walk-aways). In addition, if there is a formula for the cash component, it must be matched to the formula for the stock component. An important threshold issue is whether the parties intend for the values of the stock and cash components to remain equal as the price of the acquiror's shares fluctuates or whether there should be scenarios in which the values of the cash and stock components can diverge. This will be a vital consideration in determining the proper allocation procedures for the cash and stock components in circumstances where target shareholders are afforded the opportunity to make a consideration election.

The simplest formula in a part-cash, part-stock transaction is a fixed exchange ratio for the stock component linked with a fixed per-share cash amount for the cash component, with fixed percentages of the target's shares being converted into cash and stock, respectively. Because the value of the stock component of the transaction will vary with fluctuations in the acquiror's share price while the cash component remains fixed, it is important in transactions in which shareholders may elect the type of consideration that the allocation procedures are sensitive to the potential for significant oversubscriptions for stock, if the value of the acquiror's shares rises, and significant oversubscriptions for cash, if the value of the acquiror's shares declines. After all, at the time the target's shareholders make the decision to subscribe to a particular mix of consideration, they will have more visibility into what the acquiror's stock price will be at closing than the transaction parties will have had at signing. Because using a fixed exchange ratio for the stock component and a fixed per share cash amount for the cash component will often lead to differing consideration being paid to shareholders making one election or the other, in some instances, the parties may agree to track the blended value of the cash and stock consideration until closing and pay all shareholders the same blended per share value while still permitting target shareholders to make a cash or stock election. This structure has the benefit of treating all shareholders equally but runs the risk of requiring the acquiror to issue more shares or pay more cash than was initially contemplated at signing. Consequently, in order to mitigate this risk and preserve the tax-free treatment of the deal, parties typically will place limits on the aggregate amount of cash to be paid or number of shares to be issued in circumstances where target shareholders may make a consideration election.

A more common hybrid pricing mechanism is to link a floating exchange ratio pricing formula for the stock component with a fixed cash price. This formula has the

advantage of equalizing the stock and cash values (generally based upon the average trading price for the acquiror's shares over a 10- to 30-day trading period prior to the effective date of the merger). This approach helps facilitate a cash election procedure by minimizing any economic differential pushing shareholders toward either the cash or stock consideration. However, issues may still arise in situations where the acquiror's shares trade outside the collar range established for the floating exchange ratio or where there is a last-minute run-up or decline in the price of the acquiror's stock.

While there can be a variety of business reasons for adjusting the aggregate limits on the percentage of target shares to be exchanged for cash versus stock consideration, historically, the most common reason has been the desire to preserve the tax-free status of the transaction. As described below in Section IV.C.6, a part-cash, part-stock merger (including a two-step transaction with a first-step tender or exchange offer followed by a back-end merger) generally can qualify as a tax-free reorganization only if at least a minimum portion of the total value of the consideration consists of acquiror stock. Historically, satisfaction of this requirement was, in all cases, determined by reference to the fair market value of the acquiror stock issued in the merger (*i.e.*, on the closing date). Accordingly, a part-cash, part-stock merger, particularly with a fixed or collared exchange ratio, that met this requirement when the merger agreement was signed could fail to qualify as a tax-free reorganization if the value of the acquiror's shares declined before the closing date. As described in Section IV.C.6, Treasury regulations issued in 2011 permit the parties, in circumstances where the consideration is "fixed" within the meaning of the regulations, to determine whether this requirement is met by reference to the fair market value of the acquiror stock at signing rather than at closing. The regulations clarify that parties can rely on the signing date rule even if the acquisition agreement contemplates a stock/cash election, as long as the aggregate mix of stock/cash consideration is fixed.

Adding an additional degree of complexity, hybrid cash-stock mergers may have formula-based walk-away rights. The walk-away formula can be quite complex, reflecting the specific concerns of the acquiror and the target.

Part-cash, part-stock transactions can also be structured to avoid triggering a vote by the acquiror's shareholders under stock exchange rules, by providing for a decrease in the stock portion of the consideration (and a corresponding increase in the cash portion of the consideration) to the extent necessary to keep the number of shares issued below the relevant threshold (as was done in the Pfizer/Wyeth transaction).

In structuring a part-cash, part-stock pricing formula and allocating the cash and stock consideration pools, it is also important to consider how dissenting shares, employee stock options and other convertible securities will be treated. In addition, a board considering a proposal involving both cash and stock consideration should seek the advice of counsel with regard to whether the transaction may invoke enhanced scrutiny under *Revlon*.

b. Allocation and Oversubscription

A key issue in part-cash, part-stock transactions is choosing the best method of allocating the cash and stock components to satisfy divergent shareholder interests. The simplest allocation method is straight proration without target shareholder elections. In a straight proration, each of the target's shareholders receives a proportionate share of the aggregate pools of stock and cash consideration. Thus, in a transaction in which 50% of the consideration is being paid in stock and 50% of the consideration is being paid in cash, each target shareholder exchanges 50% of its shares for acquiror stock and 50% of its shares for cash. Shareholders who exchange their shares for a mixture of cash and stock generally will recognize gain, for federal income tax purposes, on the exchange to the extent of the lesser of (1) the gain on the exchange, measured as the difference between the fair market value of the stock and cash received over their tax basis in their shares, and (2) the amount of cash received. Thus, one drawback of straight proration is that the target's shareholders cannot choose their desired form of consideration and, accordingly, may be required to recognize taxable gain.

Another approach is the use of a cash election merger. Cash election procedures provide the target's shareholders with the option of choosing between cash and stock consideration. These procedures allow short-term investors to cash out of their positions, while longer-term investors can exchange their shares in a tax-free exchange. Cash election procedures work best where a mechanism equalizes the per share value of the cash and the stock consideration. Contractual provisions and related public disclosures concerning the election procedures must be drafted carefully to deal with the possibility that there may be significant oversubscriptions for one of the two types of consideration.

Of course, the easiest way of assuring simplicity in a cash election process is to provide for straight proration in the event of oversubscriptions for either the cash or the stock pool. This allocation method is still preferable to a straight proration without election procedures, because even if there is an oversubscription, some shareholders will elect to receive the undersubscribed consideration and some shareholders will not return an election form and can be deemed to have elected to receive the undersubscribed consideration. Proration in this context, however, also has certain significant drawbacks. Few target shareholders will be fully satisfied because most will get a prorated portion of the undesired consideration and will also incur tax. Proration within the oversubscribed election pool will be most compelling when there is a significant difference between the value of the cash and stock consideration that is driving the oversubscriptions.

Another, albeit rarer, approach for handling oversubscriptions has been to select shareholders on a random or other equitable basis from those who have elected to receive the oversubscribed consideration until a sufficient number of shares are removed from the oversubscribed pool. The methods by which shareholders are selected for removal from the oversubscribed pool vary from a straight lottery to selection based on block size or time of election. Since proration to account for an oversubscription of cash generally does not result in shareholders incurring additional tax beyond that which is caused by

their election, there is some precedent for using proration for cash oversubscriptions but a lottery selection process for stock oversubscriptions.

4. Valuing Stock Consideration in Acquisition Proposals

Even once the form of consideration is settled, targets are still confronted with the challenge of properly valuing the consideration offered in a proposed transaction. This valuation is a significant element in a board's decision whether to approve a particular transaction. Even with diligence, the evaluation of a stock merger, regardless of whether it involves a sale-of-control, can be quite complex. Directors may properly weigh a number of issues beyond the headline per share payment when evaluating a proposed transaction.

a. Short- and Long-Term Values

Although current market value provides a ready first estimate of the value of a transaction to a company's shareholders, the Delaware Supreme Court in *QVC* and in other cases has stated that such valuation alone is not sufficient, and certainly not determinative, of value.[350] In the sale-of-control context, directors of a company have one primary objective: "to seek the transaction offering the best value reasonably available to the stockholders."[351] This objective would ordinarily not be satisfied by looking only to the latest closing prices on the relevant stock exchange.

In fact, in *Trans Union*, a seminal Delaware Supreme Court decision on director responsibilities in selling a company, the Court criticized the directors for relying upon the market prices of the company's stock in assessing value. The Court held that using stock market trading prices as a basis for measuring a premium "was a clearly faulty, indeed fallacious, premise."[352] Instead, the Court emphasized that the key issue must be the intrinsic value of the business, and that the value to be ascribed to a share interest in a business must reflect sound valuation information about the business. The same point was reiterated by the Delaware Supreme Court in its decision in *Time-Warner*, where the Court pointedly noted that "it is not a breach of faith for directors to determine that the present stock market price of shares is not representative of true value or that there may indeed be several market values for any corporation's stock."[353]

When valuing stock consideration, in addition to current stock prices, directors should also consider historical trading prices and financial indicators of future market performance. The result of such analyses may be that a target board values the stock consideration proposed by one bidder with a lower aggregate current market value more highly than that proposed by another bidder with a higher aggregate current market value. This is especially so in the context of competing bids, where market prices may be a particularly confusing indicator. Once the offers are announced, the market may discount the securities of the higher bidder to reflect a likely victory and potential accompanying dilution, but it also may discount the securities of the lower bidder if that party is expected to raise its bid. These uncertainties, however, do not affect the validity of historical trading averages and other market comparisons that are not based on current

stock prices. Of course, the target's shareholders may not agree with the board in such a case and may reject the offer with the lower current market value.

Under either the *Revlon* standard or the traditional business judgment rule, the valuation task necessarily calls for the exercise of business judgment by directors. A board must not only look at financial valuations, but also must make judgments concerning the potential for success of the combined company. Due diligence by both parties to a stock-based merger is indispensable to informed decision-making, and boards will typically carefully review pro forma financial information. Directors of a company may need to consider such factors as past performance of the security being offered as consideration, management, cost savings and synergies, past record of successful integration in other mergers, franchise value, antitrust or other regulatory issues (such as foreign direct investment approvals), earnings dilution and certainty of consummation. While predicting future stock prices is inherently speculative, a board can and should evaluate such information in the context of the historic business performance of the other party, the business rationale underlying the merger proposal and the future prospects for the combined company. To the extent competing bids are under review, directors should be careful to apply comparable evaluation criteria in an unbiased manner to avoid any suggestion that they have a conflict of interest pushing them to favor one bid over another or that they are not acting in good faith.

Absent a limited set of circumstances as defined under *Revlon*, directors are not required to restrict themselves to an immediate or short-term time frame. Instead, directors are entitled to select the transaction they believe provides shareholders with the best long-term prospects for growth and value enhancement with the least amount of downside risk; directors thus have substantial discretion to exercise their judgment. In its *Time-Warner* decision, the Delaware Supreme Court stated that the directors' statutory mandate "includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability."[354] In the same vein of judicial deference to director decision-making, *Time-Warner* likewise explained that, even when a transaction is subject to enhanced scrutiny, a court should not be involved in "substituting its judgment as to what is a 'better' deal for that of a corporation's board of directors."[355]

b. Other Constituencies and Social Issues

In stock mergers not involving a change-of-control, Delaware directors may appropriately consider the effect of the transaction on non-shareholder constituencies. In seeking to achieve shareholder value, directors are permitted to take into account the impact of the prospective transaction on the company, its employees, its customers and the community in which it operates.[356] Some states outside Delaware, such as Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon and Pennsylvania, have adopted statutes known as "constituency statutes" specifically permitting boards to take into account such factors when making their business decisions. Some of these statutes, such as those in Maryland and Oregon, only permit boards to consider the interests of other constituencies within

the change-of-control context.[357] The manner in which more broadly drafted constituency statutes interact with a board's duties in a change-of-control context, and whether a target board can rely on such statutes to justify considering the interests of other constituencies instead of just maximum value to shareholders varies from state to state.[358] The economic terms of a proposed merger or an acquisition transaction and the benefits that the transaction brings to shareholder interests will predominate in the directors' inquiry. Nevertheless, "social issues"—concerns for the community and the combination's impact on the continued viability of various operations—can play an important role in bringing two merger partners to the negotiating table and may be properly considered by directors in evaluating the strategic benefits of a potential merger or acquisition transaction not involving a change-of-control, at least insofar as they will promote future value.

Consideration of employee and other constituent interests is also important in assuring a smooth transition period between the signing of a merger agreement and the closing of the transaction. It is important for the selling company to strive to preserve franchise value throughout the interim period, which may be more difficult in mergers that require a lengthy time period for consummation. Moreover, the impact of a proposed merger on a selling company's franchise and local community interests can have a direct impact on the acquiror's ability to obtain the requisite regulatory approvals.

c. Low-Vote or No-Vote Stock Consideration

Where an acquiror has a low-vote or no-vote class of capital stock, it may seek to use such stock as currency in an acquisition. Typically, a class of no-vote or low-vote shares trades at a discount to its counterpart with full voting rights. Accordingly, a target board may take into account any such discount in evaluating the value of such low-vote or no-vote stock consideration. In addition, certain transaction structures require the use of solely (or at least a sufficient quantum of) acquiror voting stock in order to qualify as a "reorganization" for federal income tax purposes.

5. Contingent Value Rights

a. Price-Protection CVRs

Where target shareholders are particularly concerned about assessing the value of acquiror securities received as merger consideration, the parties can employ a contingent value right ("CVR") to provide some assurance of that value over some post-closing period of time. This kind of CVR, often called a "price-protection" CVR, typically provides a payout equal to the amount (if any) by which the specified target price exceeds the actual price of the reference security at maturity of the CVR. Unlike floating exchange ratios, which only provide value protection to target shareholders for the period between signing and closing, price-protection CVRs effectively set a floor on the value of the reference securities issued to target shareholders at closing over a fixed period of time, usually ranging from one to three years.

For example, a price-protection CVR for a security that has a $40 market value at the time of the closing of a transaction might provide that if, on the first anniversary of the closing, the average market price over the preceding one-month period is less than $38, the CVR holder will be entitled to cash or acquiror securities with a fair market value to compensate for the difference between the then-average trading price and $38. Price-protection CVRs may also include a floor price, which caps the potential payout under the CVR if the market value of the reference shares drops below the floor, functioning in the same manner as a collar or a cap in the case of a floating exchange ratio. For example, the previously described CVR might include a $33 floor price, such that CVR holders would never be entitled to more than $5 in price protection (the difference between the $38 target price and the $33 floor price), thereby limiting the financial or dilutive impact upon the acquiror at maturity of the CVR. Despite some recent uses of price protection CVRs, they generally are less commonly used than event-driven CVRs (described below).

In most cases, CVRs are memorialized in a separate agreement, which usually calls for a trustee or rights agent to act on behalf of the holders. At maturity, CVRs may be payable in cash or acquiror securities or, in some cases, a combination of the two at the option of the acquiror. Acquirors may also negotiate for the option of extending the maturity of the CVRs, typically in exchange for an increase in the specified target price. In this way, an acquiror gives itself more time to achieve the specified target stock price, even at the cost of establishing a higher target stock price at the time of the transaction. Targets typically require the acquiror to make price-protection CVRs transferable (in which case the CVRs generally also have to be registered under the Securities Act of 1933 (the "Securities Act"))[359] and, in some cases, to list them on a stock exchange.

b. Event-Driven CVRs

In recent years, CVRs have predominantly been used to bridge valuation gaps relating to contingencies affecting the target company's value, such as, for example, the outcome of a significant litigation, or the regulatory approval of a new drug of the target. A CVR of this type, often called an "event-driven" CVR, may also increase deal certainty by allowing the parties to close the deal without the contingency having been resolved. Event-driven CVRs typically provide holders with payments when certain events resolving the contingency occur, or when specific goals, usually related to the performance of the acquired business, are met. For instance, in Eli Lily's acquisition of Prevail Therapeutics, each share of Prevail Therapeutics received, in addition to cash consideration, a non-tradable CVR of up to $4.00 per share in cash payable upon the first regulatory approval for commercial sale of a product from Prevail Therapeutics' pipeline in one of a specified list of countries, with the value of the CVR decreasing linearly on a monthly basis if such first regulatory approval is not obtained by a specified date. Furthermore, Bristol-Myers Squibb's $93 billion acquisition of Celgene provided for an additional cash payment upon FDA approval of three late-stage drug assets.

Although both price-protection and event-driven CVRs can provide significant benefits in the structuring of a transaction, parties considering their use need to be aware

of potential pitfalls. CVRs are highly structured instruments with many variables, and their negotiation and implementation can introduce significant additional complexity to a deal. While CVRs may be useful tools in bridging valuation gaps and overcoming disagreements, there is also a possibility that they create their own valuation issues and increase the potential for disputes during negotiations. Moreover, because CVRs remain outstanding and often impose restrictions on the actions of the acquiror long after closing, they may become the source of litigation, particularly where the parties did not anticipate potential misalignments between the interests of the acquiror and the CVR holders. Finally, CVRs are subject to a host of additional securities law, accounting and tax considerations, and parties contemplating use of CVRs should seek legal, financial, accounting and tax advice.

6. Federal Income Tax Considerations

As a result of both an acquiror's need to conserve cash and the desire of shareholders of the target to have the opportunity for tax deferral (and/or to participate in future value creation by the combined company), the consideration paid by the acquiror in many mergers includes acquiror stock that is intended to be received on a tax-free basis by the target shareholders. For tax-free treatment to apply, a number of requirements must be met, as described below. The requirements vary depending on the form of the transaction. For all forms of transactions (other than the so-called "double-dummy" structure), a specified minimum portion of the consideration must consist of acquiror stock. These longstanding rules were not changed by the 2017 U.S. tax reform legislation.

a. Direct Merger

In this structure, the target merges with and into the acquiror (or into a limited liability company that is a direct wholly owned subsidiary of the acquiror). This will generally be nontaxable to the target, the acquiror and the target's shareholders who receive only stock of the surviving corporation (excluding "nonqualified preferred stock" as described below), provided that such acquiror stock constitutes at least 40% of the total consideration. For these purposes, stock includes voting and nonvoting stock, both common and preferred. Target shareholders will be taxed on the receipt of any cash or "other property" in an amount equal to the lesser of (1) the amount of cash or other property received and (2) the amount of gain realized in the exchange, *i.e.*, the excess of the total value of the consideration received over the shareholder's adjusted tax basis in the target stock surrendered. For this purpose, "other property" includes nonqualified preferred stock. Nonqualified preferred stock includes any class of preferred stock that does not participate in corporate growth to any significant extent and: (1) is puttable by the holder within 20 years, (2) is subject to mandatory redemption within 20 years, (3) is callable by the issuer within 20 years and, at issuance, is more likely than not to be called or (4) pays a variable rate dividend. However, if acquiror nonqualified preferred stock is received in exchange for target nonqualified preferred stock, such nonqualified preferred stock is not treated as "other property." Any gain recognized generally will be capital gain, although it can, under certain circumstances, be taxed as dividend income.

Historically, the requirement that acquiror stock constitute at least 40% of the total consideration was, in all cases, determined by reference to the fair market value of the acquiror stock on the closing date. Treasury regulations issued in 2011 permit the parties, in circumstances where the consideration is "fixed" (within the meaning of the regulations), to determine whether this requirement is met by reference to the fair market value of the acquiror stock at signing rather than at closing, adding flexibility and certainty on an issue essential to achieving tax-free treatment. The regulations also clarify that this "signing date rule" is available in certain variable consideration transactions with collars.

b. Forward Triangular Merger

In this structure, the target merges with and into an at least 80% owned (usually wholly owned) direct subsidiary of the acquiror, with the merger subsidiary as the surviving corporation. The requirements for tax-free treatment and the taxation of non-stock consideration (including nonqualified preferred stock) are the same as with a direct merger. However, in order for this transaction to be tax free, there are two additional requirements. First, no stock of the merger subsidiary can be issued in the transaction. Thus, target preferred stock may not be assumed in the merger but must be reissued at the acquiror level or redeemed prior to the merger. Second, the merger subsidiary must acquire "substantially all" of the assets of the target, which generally means at least 90% of net assets and 70% of gross assets. This requirement must be taken into account when considering distributions, redemptions or spin-offs before or after a merger.

c. Reverse Triangular Merger

In this structure, a merger subsidiary formed by the acquiror merges with and into the target, with the target as the surviving corporation. In order for this transaction to be tax free, the acquiror must acquire, in the transaction, at least 80% of all of the target's voting stock and 80% of every other class of target stock in exchange for acquiror voting stock. Thus, target non-voting preferred stock must either be given a vote at the target level and left outstanding at that level, exchanged for acquiror voting stock or redeemed prior to the merger. In addition, the target must retain "substantially all" of its assets after the merger.

d. Section 351 "Double-Dummy" Transaction

An alternative structure is for both the acquiror and the target to be acquired by a new holding company in a transaction intended to qualify as a tax-free exchange under Section 351 of the Internal Revenue Code. As a corporate matter, this would be achieved by the holding company creating two subsidiaries, one of which would merge with and into the acquiror and the other of which would merge with and into the target in two simultaneous reverse triangular mergers. In addition to each merger potentially qualifying as a tax-free reverse triangular merger, shareholders of the acquiror and the target would receive tax-free treatment under Section 351 to the extent that they received holding company stock, which may be common or preferred (other than nonqualified

preferred stock), voting or non-voting, provided that the shareholders of the acquiror and the target, in the aggregate, own at least 80% of the voting stock and 80% of each other class of stock (if any) of the holding company immediately after the transaction. Unlike the other transaction forms discussed above, there is no limit on the amount of cash that may be used in this transaction as long as the 80% aggregate ownership test is satisfied. Cash and nonqualified preferred stock received will be taxable up to the amount of gain realized in the transaction.

e. Multi-Step Transaction

A multi-step transaction may also qualify as wholly or partially tax free. Often, an acquiror will launch an exchange offer or tender offer for target stock to be followed by a merger that forces out target shareholders who do not tender into the offer. Because the purchases under the tender offer or exchange offer and the merger are part of an overall plan to make an integrated acquisition, tax law generally views them as one overall transaction. Accordingly, such multi-step transactions can qualify for tax-free treatment if the rules described above are satisfied. For example, an exchange offer in which a subsidiary of the acquiror acquires target stock for acquiror voting stock followed by a merger of the subsidiary into the target may qualify for tax-free treatment under the "reverse triangular merger" rules described above. Multi-step transactions involving a first-step offer provide an opportunity to get consideration to target shareholders more quickly than would occur in single-step transactions, while also providing tax-free treatment to target shareholders on their receipt of acquiror stock.

f. Spin-Offs Combined with M&A Transactions

A tax-free spin-off or split-off that satisfies the requirements of Section 355 of the Internal Revenue Code can be used in combination with a concurrent M&A transaction, although there are limitations on the type of transactions that could be accomplished in a tax-free manner as described in more detail below. For example, "Morris Trust" and "Reverse Morris Trust" transactions effectively allow a parent corporation to separate a business and combine it with a third party in a transaction that is tax free to parent and its shareholders if certain requirements are met. In a traditional Morris Trust transaction, all of the parent's assets other than those that will be acquired by the third party are transferred to a corporation that is spun off or split off to parent shareholders, and then the parent immediately merges with the acquiror in a transaction that is tax free to parent stockholders (*i.e.*, involving solely stock consideration). By contrast, in a Reverse Morris Trust transaction, all assets to be acquired by the third party are transferred to a corporation that is spun off or split off to parent shareholders, and then the spin-off company immediately merges with the acquiror in a transaction that is tax free to parent stockholders.

In order to qualify as tax free to parent, the Morris Trust and Reverse Morris Trust structures generally require, among other things, that the merger partner be smaller (*i.e.*, that the shareholders of parent own more than 50% of the stock of the combined entity). Examples of Reverse Morris Trust transactions include the spin-off by Pfizer of its

Upjohn off-patent branded drugs business and combination with Mylan, the spin-off by CBS Corporation of CBS Radio and the combination of CBS Radio with Entercom Communications Corp., and the spin-off by Hewlett Packard Enterprise of certain software assets and combination with Micro Focus.

A tax-free spin-off also can be combined with a significant investment transaction in a so-called "sponsored spin-off." In this type of transaction, the parent distributes the shares of the subsidiary in a tax-free spin-off that is preceded or followed by the acquisition by a sponsor of less than 50% of either the parent or the spin-off company (pre-spin investments in the spin-off company typically are limited to less than 20%). The sponsor's investment allows the parent to raise proceeds in connection with the spin-off without having to first go through an IPO process, and can help demonstrate the value of the relevant business to the market. Sponsored spin-offs raise a number of complexities, including as to valuation, capital structure and governance.

Certain requirements for tax-free treatment under Section 355 of the Internal Revenue Code are intended to avoid providing preferential tax treatment to transactions that resemble corporate-level sales. Under current law, a spin-off coupled with a tax-free or taxable acquisition of parent or spin-off company stock will cause the parent to be taxed on any corporate-level gain in the spin-off company's stock if, as part of a plan (or series of related transactions) that includes the spin-off, one or more persons acquire a 50% or greater interest in the parent or the spin-off company.

Acquisitions occurring either within the two years before or within the two years after the spin-off are presumed to be part of such a plan or series of related transactions. Treasury regulations include facts and circumstances tests and safe harbors for determining whether an acquisition and spin-off are part of a plan or a series of related transactions. Generally, where there have been no "substantial negotiations" with respect to the acquisition of the parent or the spin-off company or a "similar acquisition" within two years prior to the spin-off, a post-spin acquisition of the parent or the spin-off company solely for acquiror stock will not jeopardize the tax-free nature of the spin-off.

Post-spin equity transactions that are part of a plan remain viable where the historic shareholders of the parent retain a greater-than-50% interest (by vote and value) in the parent and the spin-off company after the transaction. Where the merger partner is larger than the parent or spin-off company to be acquired, it may be possible to have the merger partner redeem shares or pay an extraordinary distribution to shrink its capitalization prior to the combination.

Additional rules apply where the post-spin-off transaction is taxable to the former parent shareholders (*e.g.*, acquisitions involving cash or other taxable consideration). Because post-spin transactions can cause a spin-off to become taxable to the parent corporation and its shareholders, it is customary for the tax matters agreement entered into in connection with a spin-off to impose restrictions with respect to such transactions, and to allocate any resulting tax liability to the corporation whose acquisition or other transaction after the spin-off triggered the tax.

V.

Deal Protection and Deal Certainty

One of the fundamental tensions that leads to intense negotiations in a public company merger agreement is the different sense in which the acquiror and seller want deal certainty. On the one hand, the seller wants as much certainty as possible that the deal will close, but the acquiror wants flexibility to respond to adverse changes relating to the target company and protection from misrepresentations. On the other hand, when it comes to the possibility of a competing bid and the target company board's ability to respond to it, the seller wants maximum flexibility while the acquiror wants the deal to be as "tight" as possible.

Merger agreements typically include a variety of provisions intended to balance each party's desire to preserve its flexibility to respond to future developments and comply with fiduciary duties, while ensuring that the other party remains obligated to consummate the transaction. The key provisions in this regard are (1) "deal protection" devices intended to address interloper risk; (2) closing conditions giving the acquiror a right to walk away from a transaction without liability if a "material adverse effect" or "material adverse change" with respect to the target occurs; and (3) the remedies available in connection with a party's failure to comply with the agreement or otherwise close the transaction, including as a result of a failure to obtain the requisite financing or governmental approvals. These provisions can significantly influence whether an M&A transaction will be completed, renegotiated or abandoned in the face of a post-signing change in circumstances.

A. Deal Protection Devices: The Acquiror's Need for Certainty

"Deal protection" devices—such as break-up fees, no-shop clauses, force-the-vote provisions, shareholder voting agreements and information and matching rights—permit bidders "to protect themselves against being used as a stalking horse and [provide] consideration for making target-specific investments of time and resources in particular acquisitions."[360] Targets typically agree to provisions of this type to induce value-maximizing bids. Delaware courts have recognized that deal protection devices are permissible so long as the deal protection package as a whole is reasonable under the circumstances.

Courts generally review deal protection devices under the enhanced scrutiny analysis set out in *Unocal* and *Revlon*.[361] The reviewing court will examine closely the context of the board's decision to agree to the deal protections. As the Delaware Court of Chancery has stated, the reasonableness inquiry contemplated by *Unocal* and *Revlon*:

> does not presume that all business circumstances are identical or that there is any naturally occurring rate of deal protection, the deficit or excess of which will be less than economically optimal. Instead, that inquiry examines whether the board granting the deal protections had a reasonable

> basis to accede to the other side's demand for them in negotiations. In that inquiry, the court must attempt, as far as possible, to view the question from the perspective of the directors themselves, taking into account the real world risks and prospects confronting them when they agreed to the deal protections.[362]

Because different negotiating dynamics can lead to a deal process being viewed under *Revlon* as reasonable under one set of circumstances but not another, a court may factor perceived process deficiencies into its evaluation of deal protections. For instance, the Delaware Court of Chancery recently concluded, at the pleading stage, that a financial advisor's communications with a bidder concerning the price of a potential topping bid allowed plaintiffs to state a claim under the *Revlon* framework for aiding and abetting against the financial advisor and the acquiror, despite an otherwise reasonable sale process and set of deal protections, including a below-average termination fee.[363]

1. Break-Up Fees

A common element in the package of deal protection measures is a termination (or "break-up") fee payable by the target to the acquiror in the event that the target terminates the merger agreement to accept a superior proposal, or in other specified circumstances generally involving the failure of the merger to occur because of a third-party bid. One rationale for offering bidders break-up fees is to incentivize them to participate in a competitive bidding process, as they compensate a bidder whose definitive agreement to acquire the target is terminated for the risks and costs incurred in signing and announcing an agreement for a transaction that may not ultimately be completed. Of course, termination fees, even more than other deal protection devices, impose an easily calculable cost on interlopers, and accordingly, at some levels, may deter other potential acquirors from making an acquisition proposal after an agreement has been reached. An "excessive" break-up fee therefore will be viewed critically—and may be invalidated—by a court.[364]

Break-up fees can be triggered by different events. The most common triggers, which are generally considered unobjectionable by courts, are when the target company terminates the agreement to enter into a superior proposal, or when the acquiror terminates because the target board withdraws its recommendation in favor of the transaction. A break-up fee can also be triggered by a transaction during a "tail" period following termination for failure to obtain shareholder approval in circumstances where an alternative acquisition proposal was made public prior to the shareholder vote, and sometimes also by a breach of a provision of the agreement or failure to close by the "drop dead" date. In such cases, acquirors have argued that targets should be "presumed" to be acting against the deal at hand and in favor of the prospect of the alternative deal, despite covenants prohibiting such actions.

In determining the reasonableness of a termination fee, courts do not rigidly adhere to a set threshold percentage. Indeed, the question of whether equity value or enterprise value (*i.e.*, equity value *plus* net debt) should be used as the denominator in

calculating the percentage size of the fee will depend on the circumstances. For example, enterprise value may be more appropriate where the company's capital structure is highly leveraged,[365] although Delaware law generally has "relat[ed] the break-up fee to equity value," absent a "compelling reason" to deviate from that approach.[366] Courts may also question the appropriate numerator for calculating the percentage of the fee. In 2014, in the *Comverge* case, the Delaware Court of Chancery denied a motion to dismiss a claim based on the size of the termination fee where, in addition to a traditional termination fee and expense reimbursement, a topping bid would also trigger the conversion into equity of notes that were issued at the time the merger agreement was executed. If the cost of buying the equity into which the bridging loan had been converted was included as part of the fee, the percentage value of the fee would have been as high as 13%.[367]

The Delaware Court of Chancery has stated that there is no accepted "customary" level of break-up fees, but rather, that such fees (like all deal protections) should be considered contextually and cumulatively:

> That analysis will, by necessity, require the Court to consider a number of factors, including without limitation: the overall size of the termination fee, as well as its percentage value; the benefit to shareholders, including a premium (if any) that directors seek to protect; the absolute size of the transaction, as well as the relative size of the partners to the merger; the degree to which a counterparty found such protections to be crucial to the deal, bearing in mind differences in bargaining power; and the preclusive or coercive power of *all* deal protections included in a transaction, taken as a whole. The inquiry, by its very nature fact intensive, cannot be reduced to a mathematical equation.[368]

The Delaware Court of Chancery has nevertheless provided useful guidance in considering the quanta of break-up fees, upholding termination fees that have approached, and in some cases exceeded, 4%. For example, in *Dollar Thrifty*, the Delaware Court of Chancery upheld a 3.9% termination fee and expense reimbursement, stating approvingly that the fee deterred "fractional topping" and actually encouraged an interloper to "dig deep and to put on the table a clearly better offer rather than to emerge with pennies more."[369] In the *Topps* case, the Court upheld a two-tiered termination fee of approximately 3% of equity value during the first 40 days, which went up to approximately 4.3% of equity value for termination after the 40-day period elapsed, albeit noting that it was "a bit high in percentage terms."[370] The Court has stated that a termination fee of 4.4% of equity value is "near the upper end of a 'conventionally accepted' range."[371] And in *Phelps Dodge Corp.* v. *Cyprus Amax Minerals Co.*,[372] the Court cast doubt upon the validity of a 6.3% termination fee (calculated based on the deal value to the seller's shareholders), stating in *dicta* that the fee "certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point."[373]

A "naked no-vote" termination fee is a fee that a target company must pay if its shareholders fail to approve the merger, whether or not another deal had been proposed

or agreed. Courts have expressed concern at the coercive effect that a naked no-vote break-up fee can have on the shareholder vote and so, when they are included at all, the size of a naked no-vote break-up fee relative to the equity value of the target is typically lower than a break-up fee triggered in connection with an alternative offer. In the *Lear* case, the Delaware Court of Chancery upheld a naked no-vote termination fee in which the potential acquiror had the right to receive $25 million (0.9% of the total deal value) if shareholders failed to approve the merger, whether or not another deal had been proposed or agreed to.[374] Lear's board had agreed to sell the company to Carl Icahn in an LBO. When faced with significant shareholder opposition to the transaction, Lear obtained a slightly higher price in exchange for a naked no-vote termination fee equal to 0.9% of the total deal value. The shareholders rejected the deal and the company paid the termination fee. The plaintiffs then challenged the naked no-vote fee. Even though the deal was a cash-out LBO that implicated *Revlon*, the *Lear* court upheld the fee, noting that the shareholders had in fact rejected the deal, that it was rational for Icahn to demand such a fee as additional compensation in the event of a no-vote since he was effectively bidding against himself at that stage of the deal, and that Delaware courts have previously upheld naked no-vote termination fees of up to 1.4% of transaction value.[375] In some cases, purchasers are entitled to expense reimbursement up to a specified cap in the event of a no-vote instead of a payment of a fixed amount. In any case, the payment upon a naked no-vote rarely exceeds 1% of the target's equity value.

Naked no-vote fees and expense reimbursement provisions require special consideration in light of potential M&A-related activism campaigns and the associated heightening of the risk that activist opposition results in shareholder rejection of a transaction. This heightened risk also exists, and parties should evaluate whether a naked no-vote fee or expense reimbursement may be appropriate, in circumstances where approval of the acquiror's stockholders is required in connection with the issuance of acquiror stock as consideration in the transaction.

2. "No-Shops," "No-Talks" and "Don't Ask, Don't Waive" Standstills

A "no-shop" provision in a merger agreement provides that a selling company will not encourage, seek, solicit, provide information to or negotiate with third-party bidders. However, in order to allow the directors to fulfill their fiduciary duties, the no-shop will generally allow the seller to respond to unsolicited offers by supplying confidential information and to consider and negotiate with respect to competing bids that come in unsolicited and that may lead to a better offer.

The Delaware courts accept the need for no-shop clauses to extract the maximum bids from potential acquirors and have held that it is "critical" that bargained-for contractual provisions be enforced, including by awarding post-closing damages in appropriate cases.[376] However, Delaware courts are willing to police no-shop clauses to ensure that they are not used to deny shareholders access to the best available transaction. For example, the Delaware courts have refused to enforce no-shop provisions where the acquiror secured the deal protection measure through its own misconduct, or where there are "viable claims of aiding and abetting against the holder of third party contract

rights."[377] In *In re Del Monte Foods Co. Shareholders Litigation*,[378] the plaintiffs sought to enjoin the enforcement of a no-shop provision by a group of private equity buyers in its proposed $5.3 billion cash acquisition of Del Monte. The no-shop provision prevented Del Monte from soliciting acquisition proposals after the signing of the merger agreement, once a 45-day go-shop period had passed. In evaluating the petition, the Delaware Court of Chancery considered:

> (1) whether the acquiror knew, or should have known, of the target board's breach of fiduciary duty; (2) whether the . . . transaction remains pending or is already consummated at the time judicial intervention is sought; (3) whether the board's violation of fiduciary duty relates to policy concerns that are especially significant; and (4) whether the acquiror's reliance interest under the challenged agreement merits protection in the event the court were to declare the agreement enforceable.[379]

The Court ultimately determined that the factors weighed against enforcement of the no-shop and enjoined the parties from enforcing the provision.

In *QVC*, the Delaware Supreme Court expressed concern that the highly restrictive no-shop clause of the Viacom/Paramount merger agreement was interpreted by the board of Paramount to prevent directors from even learning of the terms and conditions of QVC's offer, which was initially higher than Viacom's offer by roughly $1.2 billion.[380] The Court concluded that the board invoked the clause to give directors an excuse to refuse to inform themselves about the facts concerning an apparently *bona fide* third-party topping bid, and therefore the directors' process was not reasonable. And in *Phelps Dodge*, the Delaware Court of Chancery stated that "no-talk" clauses that prohibit a board from familiarizing itself with potentially superior third-party bids were "troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party."[381] Boards should therefore take care that a no-shop does not also function as a "no-talk"—*i.e.*, a clause that interferes with the board's ongoing duty to familiarize itself with potentially superior bids made by third parties.

The confidentiality agreements that targets require bidders to enter into in connection with a potential transaction will often require bidders to agree to a "standstill" provision that precludes the making of an unsolicited offer outside of the process or taking other unfriendly actions, subject to limited exceptions. These provisions often include an anti-evasion clause that prohibits the potential bidder from requesting a waiver or taking actions that may make the bidder's interest in the target public. Even private requests for a waiver have often been prohibited by standstill agreements because under certain circumstances, they can lead to disclosure on the part of the target, or simply a leak, thus giving the impression that the target is "in play." The position that a target or bidder takes with respect to a provision prohibiting requests for waivers should be evaluated based on the particular circumstances in which the standstill is being negotiated.

In the 2012 *Complete Genomics* case,[382] Vice Chancellor Laster of the Delaware Court of Chancery enjoined a target company from enforcing such an anti-evasion clause, which he referred to as a "Don't Ask, Don't Waive" provision, in a "*Revlon* situation". The Court did not object to the bidder being prohibited from publicly requesting a waiver of the standstill (which the Court understood would eviscerate the standstill the bidders had agreed to by putting the target "in play"), but it held that directors have a continuing duty to be informed of all material facts, including whether a rejected bidder is willing to offer a higher price. The Court suggested that a "Don't Ask, Don't Waive" provision is analogous to the "no-talk" provision held invalid in *Phelps Dodge* and is therefore "impermissible because it has the same disabling effect as a no-talk clause, although on a bidder-specific basis."[383]

Less than a month later, however, then-Chancellor Strine's bench ruling in *In re Ancestry.com Inc. Shareholder Litigation*[384] clarified that there is no *per se* rule against "Don't Ask, Don't Waive" standstill provisions, although it did express the view that they are "potent" provisions that must be used with caution. *Ancestry* recognized the valuable function that "Don't Ask, Don't Waive" standstill provisions might play in the process of selling a company as an "auction gavel" encouraging bidders to put their best offers on the table in the auction process, rather than to leave something in reserve, with the optionality to make a higher bid outside the auction process. But the Court emphasized that "Don't Ask, Don't Waive" standstills will be subject to careful judicial review in the *Revlon* context. Then-Chancellor Strine's ruling expressed the view that the directors of the selling company should be fully informed of the use and implications of the "Don't Ask, Don't Waive" standstill provision, and that shareholders whose votes are sought for the transaction should be informed if bidders that participated in the auction are contractually prohibited from offering a topping bid. Boards that are considering the use of these standstill provisions should ensure that their decision-making process is clearly documented and disclosed to stockholders.[385] A failure to fully disclose "Don't Ask, Don't Waive" standstill provisions in confidentiality agreements could result in a finding that the stockholder vote was not fully informed, as the Court of Chancery recently concluded in a decision refusing to apply the *Corwin* doctrine based on that and other disclosure deficiencies.[386]

3. Board Recommendations, Fiduciary Outs and "Force-the-Vote" Provisions

Public company merger agreements generally include provisions requiring the board of directors of the target (and, if the acquiror's shareholders will also be voting on the transaction, the board of directors of the acquiror) to recommend that shareholders vote in favor of the merger agreement, except in specified circumstances. Merger agreements also often include provisions that permit a party to have its board change its recommendation or to terminate the agreement to accept a superior proposal, subject to the payment of a termination fee and the fulfillment of other conditions—commonly known as a "fiduciary out." In addition, merger agreements typically include a

termination right for the buyer triggered upon a change in recommendation by the target board, with a termination fee payable upon such termination.

One issue that is sometimes negotiated is whether the board may change its recommendation when the directors determine that their fiduciary duties so require, or may only do so in certain circumstances, such as in the context of a "superior proposal." *Dicta* in Delaware cases questions the validity of a merger agreement provision limiting the board's ability to change its recommendation to situations where a superior proposal has been made, on the theory that directors' fiduciary duties require the board to be able to communicate with candor with shareholders, and therefore to change its recommendation for any reason.[387] In the *Complete Genomics* case, Vice Chancellor Laster made clear his view that Delaware boards should retain the right to change their recommendation in compliance with their fiduciary duties, explaining that "fiduciary duty law in this context can't be overridden by contract" because "it implicates duties to target stockholders to communicate truthfully."[388] Similarly, in *In re NYSE Euronext Shareholders Litigation*,[389] then-Chancellor Strine expressed skepticism towards provisions that limit a board's ability to change its recommendation and described them as "contractual promises to lie in the future." He also noted that, although such provisions create litigation and deal risk, some companies accede to them in negotiations to gain a higher price.

In some cases, practitioners have sought a middle course (which courts have not addressed), drafting provisions that permit a change in recommendation in the absence of a superior proposal only if there has been an "intervening event," that is, a development that was not known (with parties sometimes debating whether to also include developments that were not reasonably foreseeable) at the time of signing and that arises in the period between signing and the shareholder vote. In recent years practitioners who choose to include an "intervening event" concept have engaged in negotiations over the precise definition of this term, and whether it should be permitted to include all new facts, or whether certain categories of events (such as changes in the acquiror's share price, in a transaction involving equity consideration) should be excluded.

Under Delaware statutory law, a corporation may agree that a merger agreement will be submitted to shareholders even if the board, having deemed the merger agreement advisable at the time of execution, subsequently changes its recommendation.[390] This device is referred to as a "force-the-vote" provision. A force-the-vote provision can be useful to an acquiror by giving the target's shareholders the opportunity to decide whether any competing offer is superior (rather than leaving that decision solely to the target's board) and delaying the possibility of the target executing a competing transaction agreement until after that vote occurs, which in turn may serve as a deterrent to third-party bids. Given this deterrent effect, a force-the-vote provision should be carefully considered together with the full package of deal protection provisions.

4. Shareholder Commitments

In addition to other deal protections, an acquiror may also seek commitments from significant shareholders of the target, whether members of management or otherwise, to support the transaction. Such commitments typically take the form of voting (or tendering) agreements entered into by shareholders concurrently with the merger or transaction agreement. The visible, up-front support of major shareholders for a transaction can have a signalling effect to other shareholders a significant deterrent to third-party bids, even where (as is more often the case) the shareholder's agreement to support the original deal would terminate if the board terminates the merger agreement to accept a superior proposal.

The combination of a "force-the-vote" provision and a support agreement from a controlling shareholder, effectively making approval of the transaction guaranteed, may run afoul of controversial Delaware precedent. In 2003 in *Omnicare, Inc.* v. *NCS Healthcare, Inc.*,[391] the Delaware Supreme Court held that no merger agreement that requires a shareholder vote can be truly "locked up," even at the behest of controlling shareholders and seemingly even at the end of a diligent shopping/auction process. This ruling has made it more difficult for majority-controlled companies to attract the highest and best offers from merger partners who may be reluctant to enter into a merger contract with a fiduciary out. As Chief Justice Veasey noted in his dissenting opinion, by "requiring that there must always be a fiduciary out, the universe of potential bidders who could reasonably be expected to benefit stockholders could shrink or disappear."[392] *Omnicare* was immediately controversial and remains so, and in 2011, a California Court of Appeal specifically declined to follow it.[393]

Even in Delaware, the effect of *Omnicare* has been limited by subsequent decisions and practice developments. In a 2004 case, the Delaware Court of Chancery clarified the type of deal protection that an acquiror can seek from a controlling shareholder after *Omnicare*. In *Orman*, the Court upheld a voting agreement that required the controlling shareholder to vote for the proposed merger and against any alternative acquisition proposal for 18 months following the termination of the merger agreement.[394] The Court identified a number of factual differences from the circumstances presented in *Omnicare*: (1) the controlling shareholders in *Orman* bound themselves to support the merger only as shareholders, but did not restrict their right as members of the board to recommend that public shareholders reject the merger; (2) the Orman board negotiated an effective fiduciary out that would allow it to entertain *bona fide* superior offers, while no fiduciary out existed in *Omnicare*; and (3) the deal in *Orman* was expressly subject to approval of a majority of the minority shareholders, which was not a requirement in the deal in *Omnicare*. It should be noted that the "fiduciary out" in *Orman* was not a right to terminate the merger agreement to accept a superior proposal, but rather consisted of the board's ability to withdraw its recommendation in favor of the merger coupled with the shareholders' ability to vote the transaction down. Similarly, in *NetSpend*, Vice Chancellor Glasscock held that "although the voting agreements appear to lock up approximately 40% of the stock in favor of the

[proposed transaction], they are saved by the fiduciary-out clause. Specifically, the voting agreements terminate upon the Board's termination of the Merger Agreement."[395] The fiduciary out in *NetSpend* permitted the company to accept a more favorable acquisition proposal from a third party, subject to customary no-shop and termination fee provisions. In response to the restrictions of *Omnicare* and subsequent case law, lock-ups with controlling shareholders are sometimes structured so that a certain "acceptable" percentage (*e.g.*, 35%) of the target's stock is subject to an irrevocable voting commitment, while the controller is relieved of its obligation to vote the remainder of its shares in favor of the transaction if the target's board withdraws its recommendation in favor of the transaction.[396]

After *Omnicare*, practitioners also speculated whether the *Omnicare* analysis would apply only to mergers subject to a traditional vote at a shareholder meeting, or also to mergers approved by written consent of a holder or holders of a majority of shares shortly after signing a merger agreement. Although the Delaware Supreme Court has not ruled on this issue, in 2011 in *In re OPENLANE, Inc. Shareholders Litigation*, the Delaware Court of Chancery rejected an argument that a merger was an impermissible "*fait accompli*" simply because the merger, which did not include a fiduciary out, was approved by a majority of the shareholders by written consent the day after the merger agreement was signed.[397] However, it should be noted that transactions using a sign-and-consent structure without a robust pre-signing market check may invite heightened scrutiny under the *Revlon* standard, where applicable. Moreover, even when available under a company's governing documents, written consents present additional complexity where the acquiror intends to issue registered stock to the target's shareholders because the SEC deems a consent approving a merger to constitute a private offering of the acquiring company's securities that precludes the acquiror from subsequently registering the offering on Form S-4;[398] in these circumstances, a revised structure involving a support agreement and later-delivered consent may be needed.

5. Information Rights and Matching Rights

Information rights and matching rights, which provide an acquiror with the opportunity to learn more information about an interloper's proposal and to improve its bid in response to such a proposal, are nearly universal in public company merger agreements. Specifically, information rights require a target to supply the buyer with information about subsequent bids that may appear. The holders of such rights have an informational advantage because they can prepare a revised bid with knowledge about competing bids. What are loosely referred to as "matching rights" give the buyer the opportunity, and sometimes an explicit right, to negotiate with the target for a period before the target's board can change its recommendation or terminate the agreement to accept a competing offer under the fiduciary out. There are many variations of matching rights. In a typical formulation, the buyer can match the first competitive bid and subsequent amended bids, though sometimes the buyer only is given the opportunity to match the first competitive bid.[399] Parties will often debate the proper duration of matching rights, with three to five business days being common for an initial match

period, and a shorter period—generally two to three business days—sometimes used for amended bids.[400]

On the one hand, matching rights have been criticized because they can deter subsequent bidders who do not wish to enter into a bidding contest. However, given that public companies cannot lock up deals without some fiduciary out, competing bidders cannot reasonably expect to avoid a bidding contest if the original buyer wants to pursue one. In addition, because such rights reduce the uncertainty of consummating the transaction for the initial acquiror, they can be useful in encouraging the potential acquiror to make the investment required to enter into a merger agreement.

Similarly, Delaware courts have routinely upheld information rights and matching rights, noting that "the presence of matching rights in the merger agreement do[es] not act as a serious barrier to any bidder" willing to pay more than the merger consideration.[401] However, in a 2018 appraisal action heard by the Delaware Court of Chancery, *Blueblade Capital Opportunities LLC* v. *Norcraft Cos.*, the Court indicated that a matching right providing the acquiror four business days to match a superior proposal by a third-party and two business days to match any subsequent proposal by the same bidder—a highly customary formulation, but one which the Court characterized as an "unlimited" matching right—was one element of a post-signing market check that "fell far short on many levels."[402] In so concluding, the Court noted the "disparity in the sophistication" of the parties and found that the acquiror was "acutely aware of the advantage it secured," while the target's board "did not understand what an unlimited match right was much less how that deal protection might work to hinder the go-shop."[403] Thus, practitioners should be aware that matching rights in conjunction with an otherwise flawed market check may lead to scrutiny in the Delaware courts, particularly if the target's board is not fully aware of the potential effects of the provision.

6. Other Deal Protection Devices

a. Issuance of Shares or Options

Another mechanism available to transaction parties is the issuance of equity securities to the buyer prior to the record date for the merger vote, which increases the likelihood of shareholder approval of the merger. A transaction that involves the issuance of equity securities equal to or in excess of 20% of an issuer's outstanding equity securities generally requires shareholder approval under NYSE and Nasdaq rules. While both the NYSE and Nasdaq temporarily loosened their shareholder approval rules during the COVID-19 pandemic, the relaxation of the requirements generally applied only to capital-raising transactions rather than business combinations. In any event, this structure may present fiduciary, accounting and other complexities, and is not common.

b. Loans and Convertible Loans

Some acquirors provide bridge loans or other commitments to financially distressed targets, which can have the effect of "locking up" the transaction. Courts

evaluating such commitments will consider their reasonableness in light of the circumstances. For example, in *Complete Genomics*,[404] the buyer provided $30 million in bridge financing to a financially unstable target upon the signing of a merger agreement. In the event of a topping bid, the buyer could convert the loan into shares, which, if fully drawn, represented approximately 22% of the then-outstanding stock of the target. In refusing to enjoin the transaction, Vice Chancellor Laster noted that the bridge loan "provided substantial benefit to [the target] in the form of much needed cash to get them through at least most of, and ideally all of, depending on how the future turns out, the transaction process and possibly a little bit beyond."[405] The Delaware Court of Chancery subsequently ruled in *Comverge* that a bridge loan made at the same time that a merger agreement was executed might be unreasonable under the circumstances (a transaction at a negative premium to market, and where the cost of buying the equity into which the bridging loan had been converted would have resulted in an effective termination fee as high as 13% of equity value) because it could preclude a topping bid.[406]

c. Crown Jewels

A "crown-jewel" lock-up, in its classic form, is a device in which the target company grants the acquiror an option to purchase, or otherwise obtain the benefit of, key target assets in the event that the proposed merger does not close. This type of lock-up gives the acquiror assurance that even if the merger is not consummated, it will nevertheless get key pieces of the target's business. The device may also deter competing bidders, since even with a superior topping bid, the competing bidders may not get all of the assets they are seeking (*i.e.*, they may buy the target but without the crown jewels). Given their generally preclusive effect on other bids and because they are often not value-maximizing, crown-jewel lock-ups fell out of favor after *Revlon*. At times, however, targets have granted options over rights or other assets for other legitimate business reasons.

For example, in 2012, in exchange for certain present and future cash payments, AuthenTec granted Apple an option to acquire a nonexclusive license to its sensor technology, separate and apart from the merger agreement between the two parties. In its proxy disclosure about this option, AuthenTec was careful to stress the reputational benefits of having public ties with Apple and the economic benefits of the expected future cash stream from Apple. A Florida court denied a shareholder plaintiff's application to enjoin the transaction.[407]

Generally, having an independent business purpose for the separate crown-jewel arrangement will increase the likelihood that the lock-up will pass judicial muster. For example, in the 2013 merger between NYSE Euronext ("NYSE Euronext") and Intercontinental Exchange, Inc. ("ICE"), ICE separately agreed with NYSE Euronext to act as the exclusive provider of certain clearing services to NYSE Euronext's European derivatives business for two years, whether or not the merger took place. The parties extensively detailed the business rationale for this agreement, mostly focusing on NYSE Euronext's need for clearing services regardless of whether the merger with ICE was

consummated. In evaluating that agreement under the *Unocal* standard, then-Chancellor Strine noted that there was "no evidence in the record that presents a barrier to any serious acquiror" and that a topping bidder could reach an economic solution with all parties concerned for a relatively small sum.[408] Thus Delaware courts will examine the preclusive effects of such side commercial arrangements on potential topping bidders in evaluating whether they are impermissible crown-jewel lock-ups.

B. Material Adverse Effect Clauses: The Target's Need for Certainty

Because of the passage of time between the signing and closing of a transaction (whether due to the need for regulatory and or shareholder approvals or other reasons), the target company will not be the same at closing as it was on the day the acquiror agreed to buy it. The question becomes how much change is permissible before the acquiror will have the right to refuse to close. Virtually all domestic public company merger agreements allow the buyer to refuse to close if there has been a "material adverse effect" on or a "material adverse change" in the target company's business (although these provisions are less common in acquisition agreements involving European companies). This "MAE" or "MAC" clause is one of the principal mechanisms available to the parties to a transaction to allocate the risk of adverse events transpiring between signing and closing.

The Delaware Court of Chancery had never recognized an MAE of sufficient magnitude to provide the acquiror the right to walk away from a deal before October 2018. At that time, in *Akorn, Inc.* v. *Fresenius Kabi AG*, the Court found that the target's business had suffered an MAE and that the merger agreement entered into by the parties allocated the risk of this event to the target, so that the buyer was allowed to walk away from the deal.[409] In a 246-page post-trial opinion, Vice Chancellor Laster presented a highly fact-intensive inquiry that served to confirm much of the existing Delaware jurisprudence regarding MAE clauses while providing additional clarity and guidance in certain areas. The Vice Chancellor's finding of an MAE sufficient to prevent the target from obtaining a court order requiring specific performance was upheld in December 2018 in a three-paragraph order issued by the Delaware Supreme Court.[410] Despite the unprecedented result, *Akorn* was decided consistent with the overriding principle found in past Delaware cases addressing this question; namely that acquirors face a steep climb when seeking to invoke an MAE and that a court's judgment as to such an argument's merits will be based on a highly fact-intensive inquiry as well as the actual contractual language agreed to by the parties. In this sense, at least to some extent, *Akorn* can be viewed as an exception that proves the rule.

The *Akorn* case arose from the proposed acquisition of U.S.-based pharmaceutical company Akorn, Inc. by Fresenius Kabi AG, a German drug maker. The parties entered into a merger agreement on April 24, 2017 that contained a "customary" MAE definition.[411] However, within months, Akorn's "business performance fell off of a cliff," despite the fact that the company had reaffirmed its guidance for 2017 on the same day that the proposed transaction with Fresenius was announced.[412] Specifically, Akorn suffered year-over-year quarterly revenue declines of greater than 25%, operating income

declines of more than 80%, and net income declines of more than 90% in each of the four quarters after the parties entered into the merger agreement – declines which the Court found were specific to Akorn's business and not attributable to general industry issues.[413] Additionally, Fresenius received a series of anonymous whistleblower letters accusing Akorn of serious regulatory issues, resulting in an investigation that uncovered what the Court deemed "serious and pervasive data integrity problems" that constituted a breach of the representations related to regulatory compliance that Akorn had made in the merger agreement.[414] Eventually, on April 22, 2018, Fresenius notified Akorn that it was terminating their agreement on several different grounds, including that Akorn's business had suffered an MAE.

While the Court ultimately agreed with Fresenius that Akorn had suffered an MAE, it was also careful to reiterate certain key aspects of preexisting MAE jurisprudence. For example, citing *IBP, Inc.* v. *Tyson Foods (In re IBP, Inc. Shareholders Litigation)*, the Court reiterated that the burden of proving an MAE rests with the buyer and that an MAE must be a long-term effect rather than a short-term failure to meet earnings targets, stating that "[a] short-term hiccup in earnings should not suffice; rather the Material Adverse Effect should be material when viewed from the longer-term perspective of a reasonable acquiror."[415] In other words, the effect on the business should "substantially threaten the overall earnings potential of the target in a durationally-significant manner."[416] The Delaware Court of Chancery reaffirmed this principle in *Snow Phipps Group, LLC* v. *KCAKE Acquisition, Inc.* in 2021 in the context of the COVID-19 pandemic, again citing the foregoing principle from *IBP*.[417]

At the same time, *Akorn* rejected the notion that MAE clauses contain an implicit "anti-sandbagging principle" that would prevent an acquiror from utilizing the clause if it had pre-transaction knowledge of the risks giving rise to the MAE. The Court declined to adopt a standard restricting MAEs to unknown events, stating that to do so "would replace the enforcement of a bargained-for contractual provision with a tort-like concept of assumption of risk, where the outcome would turn not on the contractual language, but on an ex-post sifting of what the buyer learned or could have learned in due diligence."[418]

It should be noted that the facts in *Akorn* were extreme. Parties should continue to assume that it will be exceptionally difficult to prove an MAE in court and thereby escape a deal that is no longer wanted. The Delaware Courts have reinforced this principle following *Akorn*, including by rejecting claims in *Channel Medsystems, Inc.* v. *Boston Scientific Corp.* that the falsification of documents that were included in a key FDA approval application constituted an MAE where the applicable approval was not delayed past the timing anticipated by the parties.[419] Further, the *IBP* case continues to be important not only for its explanation of the MAE concept but also because the Court ordered specific performance. The Court in *IBP* found that New York law applied, requiring the party seeking specific performance to establish its entitlement to that remedy by the preponderance of the evidence (rather than, as in Delaware, by clear and convincing evidence). The Court held that IBP had met its burden, reasoning that the business combination between IBP and Tyson was a unique opportunity, that monetary

damages would be difficult to calculate and "staggeringly large," and that the remedy was practicable because the merger still made strategic sense.[420] While then-Vice Chancellor Strine decided the *IBP* case under New York law, Delaware courts have applied his analysis to merger agreements governed by Delaware law.

In *Hexion Specialty Chemicals, Inc.* v. *Huntsman Corp.*,[421] the Delaware Court of Chancery, in 2008, reaffirmed that the acquiring company has a "heavy burden" in establishing an MAE.[422] The Court ruled that because the target disclaimed in the merger agreement that it was making representations or warranties with respect to the projections that had been submitted to the acquiror, the acquiror could not claim that the target's failure to meet those projections by a wide margin should be considered in evaluating whether there had been an MAE.[423] The Court concluded that the actual and expected performance of the target company could only be compared to the performance of the target company in the corresponding periods preceding the signing of the merger agreement. When measured against those historic results, the target company's disappointing performance did not rise to the level of an MAE.

In addition to the difficulty in establishing that a "material adverse effect" has occurred, parties seeking to invoke MAE clauses have also had difficulty overcoming the long list of exceptions that a typical MAE clause contains reflecting the risks that are allocated to the buyer, even if they were able to show that a material adverse effect had occurred. In *Genesco* v. *Finish Line*, the Tennessee Chancery Court in 2007 refused to excuse performance by Finish Line and UBS because the cause of Genesco's downturn—general economic or industry conditions—had specifically been excluded from the definition of the MAE.[424] And in *AB Stable VIII LLC* v. *MAPS Hotels and Resorts One LLC et al.*, the Delaware Court of Chancery in 2020 opined that the purpose of the exceptions to an MAE clause is to "shift[] systematic risk to Buyer."[425]

In *AB Stable*, the Court concluded that, even if the downturn in the target's business resulting from the COVID-19 pandemic would have been sufficient to constitute a material adverse effect, the downturn fell within a carveout to the MAE provision. Even though the specific cause of the company's downturn (the COVID-19 pandemic) was not specifically excluded from the definition of the MAE, the Court held that it was captured by the exception for "calamities," and the Court suggested (but did not hold) that it may be captured by natural disasters as well. The Court also rejected the buyer's argument that other MAE exceptions, such as general changes in industry, could not apply because the exceptions exclude only those consequences of specified root causes, finding that the "plain language" of the MAE "does not require a determination of the root cause of the effect."[426]

As Vice Chancellor Laster noted in *Akorn*, in today's M&A market, public company targets have tended to negotiate long lists of factors—such as economic and industry developments (often to the extent they do not have a disproportionate impact on the adversely affected party)—that are excluded from the definition of an MAE.[427] Given the decision in *AB Stable* as well as Delaware's strong commitment to the freedom of counterparties to allocate risk without judicial interference, parties should carefully

choose the language of such exceptions. And in light of the *Akorn* decision, targets should not expect that the acquiror's knowledge of a risk prior to signing that later causes serious adverse consequences will preclude successfully asserting an MAE unless such an exception is expressly provided in the MAE definition.[428]

While the prior discussion has focused on judicial precedent regarding claims that an MAE had occurred, the presence of an MAE clause can also serve as a lever that the acquiror can use in negotiations with a target that has suffered adverse developments after entering into a definitive agreement. An acquiror claiming that a target MAE occurred can put the target company in the difficult position of either litigating to enforce the original transaction terms (running the risk that the alleged MAE is established) or accepting renegotiated terms, such as a reduced price. For example, LVMH's $16.2 billion merger agreement to acquire Tiffany & Co. had no MAE carveout for a pandemic, allowing LVMH to argue that Tiffany's 37% drop in revenue year-over-year and negative earnings from operations, combined with a pessimistic outlook for the recovery of retail, constituted an MAE, leading to a renegotiation of terms that saved LVMH $430 million.

These and other cases show that the COVID-19 pandemic has resulted in an increased focus on the operation of MAE clauses and related provisions, which became central in evaluating the contractual path forward for deals pending during the height of the crisis. The outcome of litigation involving the interpretation of such provisions is likely to have lasting effects on the legal drafting of such provisions as well as the allocation of risks in strategic transactions, although the current trend is toward an evolution, rather than a revolution, in this area of the law.

C. Ordinary Course Covenants

M&A transaction agreements generally include covenants requiring the target to continue operating its business in the ordinary course until the closing of the acquisition – and the target's compliance in all material respects with these covenants (similar to other covenants), is a condition to closing. Relative to MAE provisions, buyers have at times been more successful in escaping soured transactions based on claims that targets have failed to sufficiently comply with "ordinary course" covenants. These covenants have come into particular focus during the COVID-19 pandemic, but the groundwork for their relatively strict application – even in cases where the breach arises from circumstances that were not reasonably foreseeable or within the control of the target – predates the pandemic. In *Cooper Tire & Rubber Company* v. *Apollo (Mauritius) Holdings Pvt. Ltd. et al.*, Vice Chancellor Glasscock held that Cooper Tire had not complied with its ordinary course covenants during the pendency of a merger with Apollo when a labor union at one of Cooper Tire's facilities went on strike in opposition to the merger agreement announcement and Copper Tire stopped payments to suppliers who continued to ship supplies during the strike. Similarly, in *AB Stable*, the Court of Chancery rejected a target's arguments that extraordinary business measures it had taken in response to the pandemic complied with the "ordinary course" provision because they did not result in an MAE and were reasonable under the extraordinary circumstances of the pandemic.[429] The Court instead held that, regardless of extraordinary circumstances, a target must

continue operating per its routines and "breaches an ordinary course covenant by departing significantly from that routine," absent the acquiror's consent.[430] The Delaware Supreme Court affirmed this ruling, noting that the covenant required the target's compliance with the covenant to be measured against its own operational history and was not subject to a reasonableness qualifier.[431]

D. Committed Deal Structures, Optionality and Remedies for Failure to Close

Traditionally, strategic buyers, with their significant balance sheets, were expected to fully commit to the completion of a cash acquisition whereas financial sponsors, who often depended on borrowing a portion of the purchase price, negotiated for financing conditions that allowed the sponsor to exit the deal in the event that they were unable to obtain financing on the terms contemplated by the financing commitment papers executed at signing.

During the LBO boom of 2005 to 2007, however, sellers were able to negotiate a purportedly seller-friendly package of financing-related provisions from financial buyers that typically included:

- *No Financing Condition*. The elimination of the financing condition left the buyer in breach in the event of a failure to obtain financing.

- *Reverse Termination Fee*. The reverse termination fee required the buyer to pay a fee in the event the buyer failed to close due to an inability to obtain financing (expanded, in some instances, to a failure to close for any reason). The reverse termination fee often was the seller's sole remedy in the event of a failure to close.

- *Denial of Specific Performance*. The acquisition agreement would often provide that the seller could not obtain specific performance of the buyer's obligation to close, or could obtain such specific performance only in limited circumstances.

- *Limited Obligations of Financial Sponsor*. Because the buyer entity that actually signed the acquisition agreement with the target typically was a shell, the private equity fund would often sign a limited guarantee of the buyer's obligation to pay the reverse termination fee. In addition, the fund typically would sign an equity commitment letter in favor of the buyer to cover the equity portion of the purchase price. This letter usually provided that the funds would become due only if a closing occurred and sometimes, but not always, provided third-party beneficiary rights to the target company.

Although originally intended to increase deal certainty for sellers, the net effect of these features was to create a transaction structure that, depending on the specific terms of the documentation, could resemble an option to buy the target, permitting the buyer to walk away for a fixed cost (*i.e.*, the reverse termination fee).

The credit crunch and financial crisis that began in 2007 put the paradigmatic private equity structure to the test as buyers (and in some cases, lenders) decided to walk away from, or renegotiate, signed deals that had not yet closed. While many of the troubled deals were resolved consensually (including through price reductions and terminations) rather than through litigation, a number of situations were judicially resolved. For example, in *United Rentals, Inc.* v. *RAM Holdings, Inc.*,[432] the Delaware Court of Chancery respected provisions denying specific performance and giving the buyer the right to terminate the deal upon payment of the reverse termination fee. In *Alliance Data Systems Corp.* v. *Blackstone Capital Partners V L.P.*,[433] the Court held that the shell companies formed by a financial sponsor to effect the merger did not have a contractual obligation to cause the sponsor, which was not a party to the merger agreement, to do anything to obtain a regulatory approval that was a condition to the shell companies' obligations to close the merger. And in *James Cable, LLC* v. *Millennium Digital Media Systems, L.L.C.*,[434] the Court rejected claims, including for tortious interference, against a financial sponsor arising out of its portfolio company's alleged breach of an asset purchase agreement, where the sponsor was not a party to the agreement, did not enter into a written agreement to provide funding and did not make enforceable promises to help fund the transaction.[435]

These market and judicial developments have influenced trends in private equity transaction structuring for more than a decade. Many private equity transactions today chart a middle course, in which a reverse termination fee is payable upon a financing failure, which also generally serves as the seller's sole remedy, but the seller retains a limited specific performance right to require the closing to occur (including the ability to compel a draw-down of the equity financing) if the closing conditions are satisfied and the debt financing is available. The *Snow Phipps* decision discussed in Section V.B above clarified the seller's specific performance right by finding that the buyer's failure to use reasonable best efforts to obtain debt financing was a breach of the agreement, and the buyer was precluded from relying on the unavailability of debt financing to avoid triggering the seller's right to specific performance. In its ruling, the Delaware Court of Chancery applied the prevention doctrine, where the nonoccurrence of a condition (in this case, obtaining debt financing) is excused if a party's nonperformance (in this case, using reasonable best efforts to obtain the debt financing) violated contractual provisions and contributed materially to the nonoccurrence of the condition; therefore, the buyer could not rely on the failure of the debt financing condition being met to avoid specific performance, because its contractual breach contributed materially to the buyer's failure to obtain debt financing.[436] A majority of strategic transactions, however, continue to employ the traditional "full remedies" model, in which the seller is expressly granted the full right to specific performance and there is no cap on damages against the buyer.

Symmetry between target termination fees and reverse termination fees has become less common, with reverse termination fees often being higher. Although reverse termination fees now frequently range from 4% to 10% of transaction value, some have been higher, sometimes reaching well in excess of 10% of deal value, and in rare cases as high as the full equity commitment of the sponsor. In addition, the acquisition

agreements governing many leveraged private equity transactions have obligated the buyers to use efforts to force lenders to fund committed financing, and in a minority of cases specifically require the pursuit of litigation in furtherance of this goal. Debt commitment letters, however, usually do not allow targets to seek specific performance directly against lenders or name targets as third-party beneficiaries. Lenders have in most cases sought to include provisions directly in acquisition agreements that limit or mitigate their own liability (commonly referred to as "Xerox provisions," having been used in the Xerox/ACS transaction). These provisions vary, but generally include: (1) limiting the target's remedy to the payment of the reverse termination fee; (2) requiring that any action against the lenders be governed by New York law; (3) requiring that the buyer and seller waive any right to a jury trial in any action against the lenders; and (4) making the lender a third-party beneficiary of these provisions.

Another structure involves a grace period allowing buyers to try to force the lenders to complete a financing. In the Berkshire Hathaway and 3G Capital acquisition of Heinz, the parties agreed to a provision (sometimes referred to as a "ketchup provision") that provided that if the acquisition financing fell through, then the buyers would have four additional months to obtain financing before Heinz would be entitled to collect its reverse termination fee due to the buyer's financing failure. Such provisions help mitigate the risk related to obtaining financing. Another provision that has appeared in some deals (such as the acquisition of Tommy Hilfiger by Phillips Van Heusen) has been the introduction of a "ticking fee" concept, in which the purchase price increases by a stated amount for each day that the closing is delayed beyond a specified target date.

In addition to financing risk, reverse termination fees are also used as a mechanism to allocate regulatory risk. In the proposed AT&T/T-Mobile transaction, the merger agreement required AT&T to pay Deutsche Telekom $3 billion and transfer spectrum with substantial value if the deal failed to win antitrust clearance. AT&T ultimately withdrew the deal amid regulatory opposition and paid Deutsche Telekom the termination fee. The $3.5 billion Halliburton/Baker Hughes reverse termination fee paid in 2016 after the DOJ sued to block the companies' proposed merger is another such example.[437]

An important decision related to damages for failing to consummate a transaction is the U.S. Court of Appeals for the Second Circuit's decision in *Consolidated Edison, Inc.* v. *Northeastern Utilities (Con Ed)*, which held that under New York law, lost shareholder premium could not be collected by the selling company or its shareholders (due to lack of standing) as damages for the buyer's alleged breach of an agreement that disclaimed third-party rights until after the "effective time" of the merger.[438] The holding in *Con Ed* could potentially leave a target without an adequate remedy for a buyer's breach where specific performance is precluded by the merger agreement or otherwise unavailable. As a result, targets have in some cases sought to address *Con Ed* by including language in the merger agreement to the effect that damages for the buyer's breach should be calculated based on shareholder loss, or by choosing Delaware law

(under which the issue addressed in *Con Ed* has not been resolved) to govern the merger agreement.[439]

The *Hexion* decision discussed above in Section V.B addressed another issue that should be considered in negotiating contractual provisions relating to remedies, which is whether post-termination liability should be limited or eliminated for certain types of breaches. In *Hexion*, the merger agreement included a provision allowing uncapped damages in the case of a "knowing and intentional breach of any covenant" and liquidated damages of $325 million in the event of other enumerated breaches. The Delaware Court of Chancery held that "a 'knowing and intentional' breach, as used in the merger agreement, is the taking of a deliberate act, which act constitutes in and of itself a breach of the merger agreement, even if breaching was not the conscious object of the act."[440] Whether and how a party should seek to define such limitations on liability is a question that should be considered in light of the particular circumstances.

As indicated by the variety of permutations that have been employed, negotiations of the deal certainty provisions in any particular transaction can proceed along a number of dimensions, including:

- the amount of the reverse termination fee(s), if any, and the trigger(s) for payment;
- the breadth of any specific performance remedy;
- the types of breaches that could give rise to post-termination damages claims;
- the circumstances in which a cap on damages, if any, will apply;
- rights and remedies under ancillary documents such as equity commitment letters, limited guarantees and debt commitment letters; and
- expense reimbursement provisions.

Transaction participants should be keenly aware of the impact and interrelation of these various components and carefully consider which package of deal certainty provisions is appropriate under the circumstances, based on factors such as whether the deal involves a strategic buyer or a financial sponsor; whether any debt financing will be required, and, if so, the extent of the leverage; the nature of any regulatory risk; the size of the transaction; and the relative bargaining power and sophistication of the parties.

VI.

Hostile M&A and Advance Takeover Preparedness

Hostile and unsolicited transactions have been an important part of the M&A market over the past several decades. Although there was a dip in such activity in 2020 (3% of global M&A activity consisted of hostile and unsolicited transactions in 2020 relative to 8% in 2019), hostile and unsolicited transactions have since rebounded to pre-pandemic levels. In 2021, they accounted for approximately $421 billion of deal activity, or approximately 7.5% of global M&A activity. Advance takeover preparedness can improve a corporation's ability to deter coercive or inadequate bids or to secure a high premium in the event of a sale of control of the corporation. Where there are gaps in a company's takeover defenses, the board must balance the desire to foreclose vulnerabilities to unknown future threats against the risk of raising the company's profile with shareholder and governance activists.

Advance preparation for defending against a harmful takeover may also be critical to the success of a preferred transaction that the board has determined to be part of the company's long-term plan. As discussed in Section II, a decision to enter into a business combination transaction does not necessarily obligate a board to serve as auctioneer. For example, in the case of a merger or acquisition not involving a change-of-control, the board retains the protection of the business judgment rule in pursuing its corporate strategy (such as staying the course with a chosen counterparty in the face of another unsolicited offer).[441]

Preparing to make a hostile bid also requires significant advance planning, as hostile deals present unique challenges for acquirors: bids generally must be made without access to non-public information about the target, premiums paid are generally higher in transactions that begin on a hostile basis, and historically a large percentage of public hostile or unsolicited bids have ultimately been withdrawn without a transaction being completed with the initial bidder and the target instead either remaining independent or being sold to a different buyer.

The following defenses should be carefully considered in connection with a company's takeover preparedness.

A. Rights Plans or "Poison Pills"

Rights plans, popularly known as "poison pills," are the most effective device for deterring abusive takeover tactics and inadequate bids by hostile bidders. The rights plan is designed not to interfere with the day-to-day operations of the companies that adopt it. Rights plans do not interfere with negotiated transactions, nor do they preclude unsolicited takeovers. The evidence is clear, however, that rights plans do have the desired effect of forcing a would-be acquiror to deal with a target's board before acquiring shares in excess of the threshold level set forth in the applicable rights plan. In

this regard, rights plans ultimately may enable a target's board to extract a higher acquisition premium from an acquiror or deter inadequate offers. Economic studies have concluded that, as a general matter, takeover premiums are higher for companies with rights plans in effect than for other companies and that a rights plan or similar protection increases a target's bargaining power. In addition, numerous studies have concluded that the negative impact, if any, of adoption of a rights plan on a company's stock price is not statistically significant.

Rights plans have long been the subject of active discussion and debate, and they continue to contribute significantly to the structure and outcome of major contests for corporate control. This debate has continued, even as many companies have allowed their rights plans to expire, have affirmatively terminated their rights plans, have modified their rights plans with watered-down protections, or have agreed not to implement rights plans going forward absent shareholder approval or ratification within some period of time, generally one year from adoption.

ISS voting guidelines for 2022 provide that ISS will generally vote on a case-by-case basis on management proposals on rights plan ratification, focusing on features of the plan, which should contain: (i) no lower than a 20% trigger, (ii) a term of no more than three years, (iii) no deadhand, slowhand, no-hand, or similar feature that limits the ability of a future board to redeem the pill, and (iv) a shareholder redemption feature (qualifying offer clause). In addition, the rationale for adopting the pill should be thoroughly explained by the company. In examining the request for the pill, ISS takes into consideration the company's existing governance structure, including: board independence, existing takeover defenses, and any problematic governance concerns. In addition, ISS proxy voting policy guidelines provide that it will recommend an "against" or "withhold" vote for all board nominees (except new nominees, who are considered case-by-case) if (x) the company has a long-term rights plan (*i.e.*, a rights plan with a term longer than one year) that was not approved by the company's shareholders, (y) the board makes a material adverse change to an existing rights plan (including extending or lowering the trigger) without shareholder approval, or (z) the company adopted a rights plan, whether short- or long-term, with a "dead hand" or "slow hand" feature. Directors who adopt a rights plan with a term of one year or less will be evaluated on a case-by-case basis, taking into account the disclosed rationale for adoption and other factors as relevant, such as a commitment to submit any renewal to a shareholder vote. ISS also has a general policy of recommending votes in favor of shareholder proposals calling for companies to redeem their rights plans, to submit them to shareholder votes or to adopt a policy that any future rights plan would be put to a shareholder vote, subject to certain limited exceptions for companies with existing shareholder-approved rights plans and rights plans adopted by the board in exercise of its fiduciary duties that will be put to a shareholder ratification vote or will expire within 12 months of adoption.

Glass Lewis believes that rights plans are not generally in shareholders' best interests and they typically recommend that shareholders vote against these plans. In certain limited circumstances, Glass Lewis supports a rights plan that is limited in scope

to accomplish a particular objective, such as the closing of an important merger, or a pill that contains a reasonable qualifying offer clause with specified attributes: (i) the form of offer is not required to be an all-cash transaction; (ii) the offer is not required to remain open for more than 90 business days; (iii) the offeror is permitted to amend the offer, reduce the offer, or otherwise change the terms; (iv) there is no fairness opinion requirement; and (v) there is a low to no premium requirement.

Glass Lewis policy is to recommend that shareholders vote against all board members who served at a time when a poison pill with a term of longer than one year was adopted without shareholder approval within the prior twelve months. If it is a staggered board, Glass Lewis will recommend voting against the remaining directors the next year they are up for a shareholder vote. If a poison pill with a term of one year or less was adopted, or if the term of a poison pill was extended by one year or less in two consecutive years, in each case, without shareholder approval and without adequate justification, Glass Lewis will also consider recommending that shareholders vote against all members of the governance committee and against the entire board, respectively.

Rights plans are less common among large companies today than they were two decades ago, when approximately 60% of the S&P 500 had plans in effect. Recent trends in shareholder activism disfavoring rights plans, as well as the ability of a board to adopt a rights plan on short notice in response to a specific threat, have led to a marked decrease in their prevalence. However, rights plans continue to be adopted by small-cap companies that feel vulnerable to opportunistic hostile bids or accumulations of shares, companies responding to unsolicited approaches or accumulations of shares, including by stockholder activists, and, as noted below, companies putting in place so-called "Section 382" rights plans. In addition, many companies have an up-to-date rights plan "on the shelf," which is ready to be quickly adopted if and when warranted, and a number of companies refreshed these materials in the wake of the COVID-19 pandemic.

There was a temporary increase in the adoption of rights plans in 2020 in the wake of the COVID-19 pandemic, during which many companies faced a precipitous decline in their stock price. ISS guidance issued in April 2020 recognized that a severe stock price decline as a result of the COVID-19 pandemic was "likely to be considered valid justification in most cases for adopting a pill of less than one year in duration" According to DealPoint, close to 100 companies adopted a rights plan in 2020, an 183% increase from 2019. The rate of rights plans in effect began to decline to more familiar levels in 2021, including because a common feature of the early 2020 "crisis pills" was their short duration, with plans generally having a duration of less than one year. As of December 31, 2021, only 141 U.S.-incorporated companies, including six companies of the S&P 500, had rights plans in effect.

A rights plan also may be adopted to protect shareholders from so-called "creeping" acquisitions of control whereby an acquiror may rapidly accumulate a controlling block of stock in the open market or from one or more other shareholders. However, rights plans are only an effective protection against creeping acquisitions to the extent the company puts a rights plan in place before such activity occurs, and a company

may only become aware of creeping acquisitions after the shareholder has already accumulated a significant position. For example, Pershing Square was able to acquire 16.5% of J.C. Penney before having to make any disclosure of its acquisition of shares. J.C. Penney thereafter adopted a rights plan, but this only guarded against future accumulations.

Despite the decreased prevalence of long-term rights plans, we continue to believe that rights plans—or at least a board's ability to adopt them rapidly when the need arises—remain a crucial component of an effective takeover defense and serve the best interests of shareholders. In particular, a rights plan can afford a target's board more time to formulate a thoughtful response to an unsolicited bid. Accordingly, boards should generally endeavor to avoid situations where this ability could be lost or significantly curtailed.

Rights plans may also be used to protect a corporation's tax assets. Opportunistic investors who see attractive buying opportunities may present special risks to corporations with NOLs, "built-in" losses and other valuable tax assets. Accumulations of significant positions in such a corporation's stock could result in an inadvertent "ownership change" (generally, a change in ownership by 5% shareholders aggregating more than 50 percentage points in any three-year period) under Section 382 of the Internal Revenue Code. If a company experiences an ownership change, Section 382 will substantially limit the extent to which pre-change NOLs and "built-in" losses stemming from pre-change declines in value can be used to offset future taxable income. As with operating assets, boards of directors should evaluate the potential risks to these valuable tax assets and consider possible actions to protect them. In the last five years, approximately 100 U.S. companies with significant tax assets have adopted rights plans designed to deter a Section 382 ownership change, according to FactSet. Such rights plans typically incorporate a 4.9% threshold, deterring new shareholders from accumulating a stake of 5% or more, as well as deterring existing five-percent shareholders from increasing their stake in a way that could lead to a Section 382 ownership change. ISS recognizes the unique features of such a rights plan and will consider, on a case-by-case basis (despite the low threshold of such plans), management proposals to adopt them based on certain factors—including, among others, the threshold trigger, the value of the tax assets, other shareholder protection mechanisms and the company's governance structure and responsiveness to shareholders. ISS will oppose any management proposal relating to a Section 382 pill if it has a term that would exceed the shorter of three years or the exhaustion of the NOLs.

A rights plan can also be used as a deal protection device in connection with the signing of a merger agreement. Rights plans in such cases may help protect a deal against hostile overbids in the form of a tender offer and could deter activist shareholder efforts to accumulate large numbers of shares and vote down a proposed merger. For example, in February 2019, after Entergis and Versum announced a merger-of-equals-style all-stock merger, and an interloper (Merck) made an all-cash bid for Versum that the Versum board found insufficient, Versum responded by adopting a 12.5% pill.

Versum later redeemed this pill after Merck increased its bid to a level the Versum board found to be superior to the all-stock deal. In considering whether to adopt a rights plan after signing a merger agreement, target boards have considered risks such as an interloper making a hostile bid and an activist trying to buy stock to hold up the deal.

Hedge funds and other shareholder activists have used equity swaps and other derivatives to acquire substantial economic interests in a company's shares without the voting or investment power required to have "beneficial ownership" for disclosure purposes under the federal securities laws. Rights plans can be drafted to cover equity swaps and other derivatives so as to limit the ability of hedge funds to use these devices to facilitate change-of-control efforts, although careful consideration should be given as to whether and how to draft a rights plan in this manner. One such rights plan was challenged in a Delaware court, and although the Court denied a preliminary injunction against the plan, the case was ultimately settled with the company making clarifications to certain terms of the rights plan.[442]

1. The Basic Design

The issuance of share purchase rights has no effect on the capital structure of the issuing company. If an acquiror takes action that triggers the rights, however, dramatic changes in the capital structure of the target company can result. The key feature of a rights plan is the "flip-in" provision of the rights, the effect of which is to impose unacceptable levels of dilution on an acquiror in specified circumstances. The risk of dilution, combined with the authority of a target's board to redeem the rights prior to a triggering event (generally an acquisition of between 10% and 20% of the target's stock, or 5% in the case of a Section 382 rights plan), gives a potential acquiror a powerful incentive to negotiate with the target's board rather than proceeding unilaterally.

A rights plan should also provide that, once the triggering threshold is crossed, the target's board may exchange, in whole or in part, each right held by holders other than the acquiror (whose rights are voided upon triggering the plan) for one share of the target's common stock. This provision avoids the expense of requiring rights holders to exercise their flip-in rights, eliminates any uncertainty as to whether individual holders will in fact exercise the rights and produce the intended dilution, and provides the board additional flexibility in responding to a triggering event. The exchange provision was used by the board of directors of Selectica when that pill was triggered by Trilogy in January 2009, and upheld by the Delaware Supreme Court in October 2010 in response to Trilogy's challenge of that pill.[443] In cases where the acquiring person holds less than 50% of a target's stock, the dilution caused by implementation of the exchange feature is substantial and can be roughly comparable to the dilution that would be caused by the flip-in provision, assuming all eligible rights holders exercise their rights.

Some companies have adopted rights plans that do not apply to a cash offer for all of the outstanding shares of the company. More recent versions of this exception have limited its scope to cash offers containing a specified premium over the market price of the target's stock. While a so-called "chewable pill" rights plan has some limited utility

and may avoid a shareholder resolution attack, it is not effective in many situations and may create an artificial "target price" for a company that does not maximize shareholder value. As discussed in the next subsection, a recent trend by some companies is to adopt rights plans with bifurcated triggers (*e.g.*, a higher trigger for Schedule 13G filers (*i.e.*, passive investors) and a lower trigger for Schedule 13D filers) to allow their large, long-term institutional investors to continue to accumulate shares even during an activist situation, while placing a lower ceiling on potential "creeping control" by activists.

2. Basic Case Law Regarding Rights Plans

Rights plans, properly drafted to comply with state law and a company's charter, typically survive judicial challenge under a *Unocal* analysis.[444] Furthermore, courts have recognized rights plans as important tools available to boards to protect the interests of a corporation.[445]

One of the most debated issues concerning rights plans focuses on whether or not a board should be required to redeem the rights plan in response to a particular bid. In this respect, courts applying Delaware law have upheld, or refused to enjoin, determinations by boards not to redeem rights in response to two-tier offers, or inadequate 100% cash offers,[446] as well as to protect an auction or permit a target to explore alternatives.[447]

In a landmark decision in February 2011, the Delaware Court of Chancery reaffirmed the ability of a board of directors, acting in good faith and in accordance with their fiduciary duties, to maintain a poison pill in response to an inadequate all-cash, all-shares tender offer.[448] Chancellor Chandler's decision in *Airgas* reaffirmed the vitality of the pill and upheld the primacy of the board of directors in matters of corporate control, even after the target company with a staggered board had lost a proxy fight for one-third of the board. The decision reinforces that directors may act to protect the corporation, and all of its shareholders, against the threat of inadequate tender offers, including the special danger that arises when raiders induce large purchases of shares by arbitrageurs who are focused on a short-term trading profit, and are uninterested in building long-term shareholder value. Essentially, the Court held that a well-informed, independent board may keep the pill in place so long as it has a good faith and reasonable basis for believing the bid undervalues the shareholders' interest in the company. The Court stated that it is up to directors, not raiders or short-term speculators, to decide whether a company should be sold. The board's—and the Court's—decisions were vindicated four years later, when, in 2015, Airgas agreed to be sold to Air Liquide at a price of $143 per share in cash, more than double Air Products' final $70 offer, in each case before considering the more than $9 per share of dividends received by Airgas shareholders in the intervening years.

A second contested issue concerning rights plans is whether they may be adopted to prevent accumulations of ownership outside of the context of an outright bid for the company. On this point, the Delaware Court of Chancery has made it clear that the board may act in response to legitimate threats posed by large stockholders. For instance, the

adoption of a rights plan to deter acquisitions of substantial stock positions was upheld by the Delaware Court of Chancery in a case involving Ronald Burkle's acquisition of almost 18% of Barnes & Noble.[449] Then-Vice Chancellor Strine held that the company's adoption of a rights plan with a 20% threshold that grandfathered the founding family's approximately 30% stake was a "reasonable, non-preclusive action to ensure that an activist investor like [Burkle] did not amass, either singularly or in concert with another large stockholder, an effective control bloc that would allow it to make proposals under conditions in which it wielded great leverage to seek advantage for itself at the expense of other investors."[450] In the Barnes & Noble case, the Court upheld the rights plan's prohibitions on "acting in concert" for purposes of a proxy contest and noted that the key question was whether the rights plan "fundamentally restricts" a successful proxy contest. In defining the behavior that might trigger a rights plan, the Court seemed to suggest that triggers should be based on the well-recognized definition of beneficial ownership in Section 13D of the Exchange Act. However, this is an unsettled point of law and, in appropriate circumstances, companies are well-advised to consider adopting rights plans that include aggregations of voting or economic interests through synthetic derivatives, which decouple the traditional bundle of rights associated with outright common stock ownership. However, in a July 2020 bench ruling by Vice Chancellor Laster in *In re Versum Materials, Inc. Stockholder Litigation*, a mootness case, Vice Chancellor Laster awarded plaintiff $12 million in fees and noted his concerns with the "truly expansive" "acting in concert" clause in question.[451]

Additionally, in 2014, the Delaware Court of Chancery upheld a rights plan adopted by the Sotheby's board of directors in response to a rapid accumulation of its stock by activist investor Third Point and other short-term speculators. Notably, the plan adopted by the Sotheby's board had a two-tier trigger structure (setting a 20% trigger for 13G filers and a 10% trigger for 13D filers). Third Point claimed that the "primary purpose" of the board's refusal to waive the lower trigger was to prevent Third Point from prevailing in a proxy context, that the rights plan was "disproportionate" to the threat that Third Point's slate of nominees posed, and that the rights plan was discriminatory because it was allegedly designed to favor the incumbent board. In *Third Point* v. *Ruprecht*, the Delaware Court of Chancery found sufficient evidence that the threat of "creeping control" posed by a hedge fund group led by Third Point created a legitimate, objectively reasonable threat and that the adoption of the rights plan was likely a proportionate response to collusive action by a group of hedge funds. In addition, the Court recognized that the board's refusal to waive the lower trigger was reasonable because Third Point still posed a threat of effective negative control—the ability to "exercise influence sufficient to control certain important corporate actions, such as executive recruitment, despite a lack of actual control or an explicit veto power."[452] Though a very fact-specific decision, the Delaware Court of Chancery's ruling confirms not only the versatility of the rights plan, but also that activist investors seeking to control the strategic direction of the company can pose a threat against which boards may properly take defensive action.

Rights plans have also been upheld outside of the corporate control context. In *Versata Enterprises, Inc.* v. *Selectica, Inc.*, the Delaware Supreme Court rejected a *Unocal* challenge to the use of a "Section 382" rights plan with a 4.99% trigger designed to protect a company's NOLs, even when the challenger had exceeded the threshold and suffered the pill's dilutive effect.[453] First, the Court concluded that the board had reasonably identified the potential impairment of the NOLs as a threat to Selectica. Second, the Court held that the 4.99% rights plan was not preclusive. Explaining that a defensive measure cannot be preclusive unless it "render[s] a successful proxy contest realistically unattainable given the specific factual context," the Court credited expert testimony that challengers with under 5% ownership routinely ran successful proxy contests for micro-cap companies. The Court sharply rejected Trilogy's contention that Selectica's full battery of defenses was collectively preclusive, holding that "the combination of a classified board and a Rights Plan do[es] not constitute a preclusive defense." The Court held that the adoption, deployment and reloading of the 4.99% pill was a proportionate response to the threat posed to Selectica's tax assets by Trilogy's acquisitions.

Directors should remain mindful that poison pills are "situationally specific defenses" that ought to be adopted with "an appropriate culture of caution in the board room."[454] For example, in the recent *The Williams Companies Stockholder Litigation* case, the Delaware Court of Chancery enjoined a rights plan adopted by The Williams Companies, Inc. in response to COVID-19-related market disruption. The rights plan had "a more extreme combination of features than any pill previously evaluated" by the Court of Chancery: a 5% ownership trigger (including both beneficial and derivative ownership interests), an expansive definition of "acting in concert" that would capture parallel conduct, and a limited "passive investor" exception.[455] At the time of adopting the rights plan, the board had not identified any specific activist threat but was instead "acting pre-emptively to interdict hypothetical future threats."[456] As this decision shows, overbroad plans, not adequately tethered to cognizable challenges to corporate policy, are legally vulnerable. However, this decision does not jeopardize tailored plans, adopted on a deliberate record, which remain a key tool for boards looking to defend long-term corporate policy and value.

3. "Dead Hand" Pills

When a board rejects an unsolicited bid and refuses to redeem its poison pill, the tactic of choice for the bidder is often to combine a tender offer with a solicitation of proxies or consents to replace a target's board with directors committed to considering the dismantling of a rights plan to permit the tender offer to proceed. The speed with which this objective can be accomplished depends, in large part, upon the target's charter and bylaws and any other defenses that the target has in place. In Delaware, shareholders can act by written consent without a meeting of shareholders unless the certificate of incorporation prohibits such action, and can call a special meeting between annual meetings if permitted under a target's certificate of incorporation or bylaws.

Some companies without staggered boards have adopted rights plans redeemable only by vote of the continuing directors on the board (*i.e.*, the incumbent directors or successors chosen by them)—a so-called "dead hand" pill. This prevents an unwanted acquiror from ousting a majority of the incumbent directors and having the newly elected directors amend or redeem the pill to allow for the acquisition. Variations of this concept come in a variety of forms. These include so-called "nonredemption" or "no hand" provisions, which typically provide that the board cannot redeem the rights plan once the continuing directors no longer constitute a majority of the board, or "limited duration," "delayed redemption" or "slow hand" provisions, which prevent a poison pill from being amended or redeemed for a specified period of time, typically starting after the continuing directors no longer constitute a majority of the board. The use of dead hand, slow hand, and no hand provisions was effectively foreclosed by Delaware case law over 20 years ago, although courts in Georgia and Pennsylvania have upheld their validity.[457] Some rights plans adopted during the wake of the COVID-19 pandemic included dead hand or slow hand features in their short-term pills. In its November 2020 guidance, ISS noted that the inclusion of such a feature in a poison pill (of either a short-term or long-term duration), was a basis for an adverse director recommendation, even if the dead hand or slow hand feature is enacted but expires before the next shareholder vote.

B. Staggered Boards

Where a target's charter does not prohibit action by written consent, the target does not have a staggered board and shareholders can fill board vacancies, a bidder for a Delaware corporation generally can launch a combined tender offer/consent solicitation and take over the target's board as soon as consents from the holders of more than 50% of the outstanding shares are obtained. Even if the target's charter prohibits action by written consent and precludes shareholders from calling a special meeting, a target without a staggered board can essentially be taken over in under a year by launching a combined tender offer/proxy fight shortly before the deadline to nominate directors at the target's annual meeting. In contrast, a target with a staggered board may be able to resist a takeover unless a bidder successfully wages a proxy fight over two consecutive annual meetings—a point well-illustrated by Airgas' ultimately successful takeover defense described in Section VI.A.2 above notwithstanding a successful proxy fight by Air Products to elect its nominees for one-third of the Airgas board. Accordingly, where available, a staggered board continues to be a critical component of an effective takeover defense strategy. Nevertheless, at year-end 2021, nearly 87% of S&P 500 companies did not have staggered boards, and it would be practically infeasible for these companies to classify their boards if a takeover threat materialized because shareholder approval would generally be required to implement a classification.

Hostile bidders can be expected to be creative in attempting to circumvent a staggered board provision and to find any hole in a target's defenses. For example, Air Products tried to reduce the effectiveness of Airgas' staggered board in connection with its 2010 hostile bid. In addition to nominating a slate of three directors to be elected to

the Airgas board at the Airgas annual meeting in September 2010, Air Products proposed a bylaw amendment that would accelerate the 2011 Airgas annual meeting to January 2011. Airgas' charter—like the charter provisions of a majority of major Delaware corporations with staggered boards—provided that directors will "be elected to hold office for a term expiring at the annual meeting of stockholders held in the third year following the year of their election." The bylaw amendment was approved by Airgas shareholders, a substantial portion of which were arbitrageurs. While the Delaware Court of Chancery upheld the validity of the bylaw amendment, the Delaware Supreme Court unanimously reversed, finding that directors on staggered boards were elected to three-year terms, and that the bylaw constituted a *de facto* removal of directors in a manner inconsistent with the Airgas charter.[458] Under Delaware law, directors on a staggered board can be removed only for cause, unless the certificate of incorporation provides otherwise.[459]

C. Other Defensive Charter and Bylaw Provisions

Defensive charter and bylaw provisions typically do not purport to, and will not, prevent a hostile acquisition. Rather, they provide some measure of protection against certain takeover tactics and allow a board additional negotiating leverage, as well as the opportunity to respond appropriately to proxy and consent solicitations. Defensive charter provisions (in addition to staggered board provisions) include: (1) provisions that eliminate or limit shareholder action by written consent or eliminate or limit the right of shareholders to call a special meeting; (2) provisions limiting the ability of shareholders to alter the size of a board or to fill vacancies on the board; (3) "fair price" provisions (which require that shareholders receive equivalent consideration at both ends of a two-step bid, thus deterring coercive two-tier, front-end-loaded offers); and (4) "business combination" provisions (which typically provide for supermajority voting in a wide range of business combinations not approved by the company's continuing directors, if the transaction does not meet certain substantive requirements).

Because certain defenses (such as the elimination of the ability of shareholders to act by written consent) may only be implemented via the charter in the case of Delaware corporations and therefore require shareholder approval, and due to general institutional investor opposition to such provisions, few companies have put forth new proposals for such provisions in recent years. However, bylaws generally can be amended without shareholder approval and can be used to implement some of the structural defenses found in charters, although such defenses, if placed only in the bylaws, would be subject to further amendment by shareholders. Bylaws, as discussed in more detail below, often contain defensive provisions in addition to those found in corporate charters, including: advance notice provisions relating to shareholder business and director nomination proposals, provisions that address the subject matters that may properly be brought before shareholder meetings and provisions establishing director eligibility standards. Bylaw provisions regarding the business to be conducted at, and the manner of presenting proposals for, annual and special meetings, as well as procedures for shareholder action by written consent (for companies that have not eliminated action by written consent in

their charter), are helpful in protecting against an unexpected proxy or consent contest for control of the board of directors and can be adopted by a board without shareholder approval. State-of-the-art bylaw procedures can be extremely important in the context of a combined tender offer/proxy contest and in light of the risks of proxy fights and consent solicitations launched by shareholder activists. Such procedures help to ensure that boards have an appropriate period of time to respond in an informed and meaningful manner to shareholder concerns and to prepare and obtain SEC clearance of any related proxy statement disclosure, and when combined with restrictions on the ability of shareholders to call a special meeting or act by written consent, constrain the timing of when a proxy contest can be launched.

ISS has adopted voting guidelines to address bylaws adopted unilaterally without a shareholder vote. ISS will generally recommend that stockholders vote against or withhold votes from directors individually, committee members or the entire board (except new nominees who should be considered case-by-case) if the board "amends the company's bylaws or charter without shareholder approval in a manner that materially diminishes shareholders' rights or that could adversely impact shareholders," considering specified factors (such as the board's rationale, the company's ownership structure, and the company's existing governance provisions, among others). Unless it is reversed or submitted to a binding shareholder vote, ISS will make voting recommendations on a case-by-case basis on director nominees in subsequent years, and will generally recommend voting against if the directors classified the board, adopted supermajority vote requirements to amend the bylaws or charter, or eliminated shareholders' ability to amend bylaws.

Companies should review their bylaws on a regular basis to ensure that they are up to date and consistent with recent case law and SEC developments, and to determine whether modifications may be advisable. The most significant of these bylaw provisions are discussed in detail below.

1. Advance Notice of Nominations and Shareholder Business

These bylaw provisions require shareholders to provide advance notice of business proposed to be brought before, and of nominations of directors to be made at, shareholder meetings, and have become common. These provisions generally set a date by which a shareholder must advise the corporation of the shareholder's intent to seek to take action at a meeting (usually a minimum of 90 to 120 days in advance of the anniversary of the prior year's annual meeting) and fix the contents of the notice, which can include information such as beneficial stock ownership and other information required by Regulation 14A of the federal proxy rules. Failure to deliver proper notice in a timely fashion usually results in exclusion of the proposal from shareholder consideration at the meeting. Bylaw provisions may also require nominees to respond to a questionnaire providing information about the candidate's background and qualifications, address agreements the candidate may have with third parties as to voting or compensation in connection with the candidate's service as a director, and require that the nominee abide by applicable confidentiality, governance, conflicts, stock ownership,

trading and other policies of the company. In light of recent activity by hedge funds and others, companies may also decide to ask for disclosure of derivative and short positions, rather than limit such disclosure to the traditional category of voting securities. The questionnaires are a useful way for boards of companies that have eligibility requirements for director nominations in their bylaws to have sufficient information to make ineligibility determinations where they are warranted.

Although the validity of advance notice bylaws has been established in many court decisions, such provisions are not immune from legal challenge. In 2012, for example, the Delaware Court of Chancery granted a motion to expedite a claim brought by Carl Icahn alleging that the directors of Amylin Pharmaceuticals had breached their fiduciary duties by enforcing the company's advance notice bylaw provision and refusing to grant Mr. Icahn a waiver to make a nomination following the company's rejection of a third-party merger proposal after the advance notice deadline.[460] In December 2014, however, the Delaware Court of Chancery alleviated some of the concerns raised by the *Amylin* decision. The court clarified that, in order to enjoin enforcement of an advance notice provision, a plaintiff must allege "compelling facts" indicating that enforcement of the advance notice provision was inequitable (such as the board taking an action that resulted in a "radical" change between the advance notice deadline and the annual meeting).[461] Consistent with this decision, in August 2017, Automatic Data Processing refused to accede to Pershing Square's request to extend the advance notice deadline for director nominations so that Pershing Square could have additional time to determine the nominees for its dissident slate. While Delaware law does not call into question the permissibility or appropriateness of advance notice bylaws as to director nominations, shareholder business or other matters, they show that the applicability of such bylaws to *all* shareholder nominations and proposals should be made explicit and that enforcement of such bylaws should be equitable.

In an important decision in January 2020, the Delaware Supreme Court upheld the right of a company responding to a shareholder proposal or nomination to insist on strict adherence to the requirements, including deadlines, unambiguously specified in advance notice bylaws, "particularly one that had been adopted on a 'clear day.'"[462] As recently as October 2021, the Delaware Court of Chancery upheld a board's use of an advance notice bylaw to reject a dissident slate from running a proxy fight, again reaffirming that Delaware courts will uphold reasonable advance notice bylaws and the enforcement of those bylaws by incumbent boards.[463] In the context of a contested election, companies should carefully review nominations and submissions for compliance and accuracy, consider appropriate action to enforce bylaw requirements and insist that nominating stockholders and their nominees complete appropriate questionnaires and submit timely, accurate and complete answers to follow-up inquiries where permitted. An orderly and transparent process, ensuring that the board has all of the information it needs to make an informed recommendation to stockholders, and that investors are apprised of the eligibility and suitability of dissident candidates, benefits the company and all shareholders.

2. Regulation of Shareholder Meetings

Provisions regarding the regulation of meetings play an important role in controlling the timing and frequency of meetings. If, as in Delaware, shareholders can be denied the right to call special meetings,[464] such a bylaw provision can delay potential proxy contests to the annual meeting. Where state law does not so permit, corporations should also consider adopting bylaw provisions that regulate the ability of shareholders to call special meetings.

Some bylaws specify a particular date or month for an annual meeting. Such provisions should be amended to provide more flexibility and discretion to the board to set an annual meeting date. A board should be authorized to postpone previously scheduled annual meetings upon public notice given prior to the scheduled annual meeting date. Section 211 of the DGCL, however, provides that if an annual meeting is not held for thirteen months, the Delaware Court of Chancery may summarily order a meeting to be held upon the application of any stockholder.[465]

The chairperson of the shareholder meeting should be specifically authorized to adjourn or postpone the meeting from time to time whether or not a quorum is present. Adjournments and postponements may help prevent premature consideration of a coercive or inadequate bid. The chair should also have express and full authority to control the meeting process, including the ability to require ballots by written consent, select inspectors of elections, and determine whether proposals and/or nominations were properly brought before the meeting.

As a matter of good planning, companies should also be alert to timing issues when undertaking friendly transactions. For instance, if a transaction is signed at a time of year near an upcoming annual meeting, management may consider putting the proposal to approve the merger on the agenda of the annual meeting rather than calling a special meeting. This, however, can be a trap for the unwary, as shareholder (and thus hostile bidder) access to the annual meeting agenda is often more liberal than to special meeting agendas, and, if an annual meeting must be significantly delayed past the one-year anniversary of the prior year's meeting (*e.g.*, due to an extended SEC comment process in connection with the merger proxy), under many standard notice bylaws, a later deadline for valid submissions of shareholder proposals may be triggered. Once triggered, this could enable a potential interloper to run a proxy contest or otherwise interfere with the shareholder vote. In many cases, the special meeting approach will be the right choice.

3. Vote Required

To approve a proposal, except for election of directors (which requires a plurality of the quorum if a company has not adopted a bylaw providing for majority voting), generally the required shareholder vote should not be less than a majority of the shares present and entitled to vote at the meeting (*i.e.*, abstentions should count as "no" votes for shareholder resolutions). For Delaware corporations, Section 216 of the DGCL dictates

this result unless the charter or bylaws specify otherwise.[466] For certain proposals such as mergers, the DGCL requires a majority of the outstanding shares to approve a proposal.

4. Action by Written Consent

If the corporation's charter does not disallow action by shareholder consent in lieu of a meeting, the bylaws should establish procedures for specifying the record date for the consent process, for the inspection of consents and for the effective time of consents. Delaware courts have closely reviewed procedures unilaterally imposed by a board with respect to the consent process to determine whether their real purpose is to delay and whether the procedures are unreasonable.[467] Delaware courts have rejected various other limitations and procedures established without shareholder approval, including minimum periods of time that a consent solicitation must stay open prior to a consent action taking effect, permitted time frames for taking such action and the ability of a company to deem a consent action ineffective if legal proceedings have been commenced questioning the validity of such action.[468]

5. Board-Adopted Bylaw Amendments

Although advance takeover preparedness is optimal, it may in some cases be appropriate to act in the face of a takeover threat. Delaware courts have affirmed a board's ability to adopt reasonable bylaw amendments in response to a hostile offer, but such amendments may be subject to heightened scrutiny. A bylaw amendment made after announcement or knowledge of an unsolicited offer will be reviewed under the *Unocal* standard, and possibly under *Blasius Industries, Inc.* v. *Atlas Corp.*,[469] as discussed in Section II.B.2.c. The most common forms of such after-the-fact defensive bylaws change the date of a shareholder meeting in the face of a proxy contest or change the size of the board. In a series of decisions, the Delaware courts have generally accepted that boards can delay shareholder meetings (by bylaw amendment or adjournment) where there is "new information" or a change in position by the board, though change of board size may not survive enhanced scrutiny.[470] For example, in 2016, the Delaware Court of Chancery issued an injunction against a plan adopted by a board of directors that would have reduced the number of directors up for election at the annual meeting in the face of the threat of a proxy contest even though the company's certificate of incorporation authorized the board to increase or decrease the number of seats on the board.[471]

6. Forum Selection Provisions

In recent years, many companies have adopted forum selection provisions to help reign in the cost of multiforum shareholder litigation. These forum selection provisions generally cover derivative lawsuits, actions asserting breaches of fiduciary duty, actions arising from the state of incorporation's business code, and actions asserting claims governed by the internal affairs doctrine.

In *Boilermakers Local 154 Retirement Fund* v. *Chevron Corp.*,[472] the Delaware Court of Chancery upheld the validity of forum selection bylaws as a matter of Delaware law. In that case, shareholders of Chevron and FedEx challenged: (1) whether bylaws could regulate the venue for shareholder corporate and derivative litigation as a matter of Delaware law; (2) whether the unilateral adoption of forum selection bylaws by a board of directors was a breach of the board's fiduciary duties; and (3) whether such bylaws could bind shareholders. The Court ultimately concluded that forum selection bylaws were facially valid under the DGCL and that a board's unilateral adoption of bylaws did not render them contractually invalid. The Court noted that Section 109(b) of the DGCL permits the bylaws to "contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[473] On the question of the board's fiduciary duties, the Court held that "[j]ust as the board of Household was permitted to adopt the pill to address a future tender offer that might threaten the corporation's best interests, so too do the boards of Chevron and FedEx have the statutory authority to adopt a bylaw to protect against what they claim is a threat to their corporations and stockholders, the potential for duplicative law suits in multiple jurisdictions over single events."[474] Finally, the Court held that the bylaws were valid as a matter of contract because investors knew when they bought stock of the corporation that the board could unilaterally adopt bylaws that were binding on shareholders.

In 2015, the Delaware General Assembly gave statutory backing to forum selection bylaws by adopting new Section 115 of the DGCL, which allows a company, in its certificate of incorporation or bylaws, to provide that "any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State."[475] Notably, this provision also provides that a forum selection bylaw may not divest stockholders of the right to bring suit in Delaware, thus overturning the result of *City of Providence* v. *First Citizens BancShares, Inc.*, where the Delaware Court of Chancery had ruled that a company could validly adopt a bylaw providing that all litigation must be brought in its non-Delaware headquarters state.[476] Jurisdictions outside Delaware are increasingly enforcing forum selection bylaws that provide that shareholder litigation must be conducted in Delaware.[477] The Delaware Court of Chancery, however, has consistently stated that it is reluctant to grant an anti-suit injunction against proceedings in a sister jurisdiction to uphold these bylaws, and instead still requires litigation filed outside of the contractually selected forum to be challenged in that jurisdiction.[478]

In March 2020, the Delaware Supreme Court reversed a 2018 Delaware Chancery Court decision and ruled that exclusive forum provisions in corporate charters that require claims under the Securities Act to be brought in federal court are permissible under Delaware law.[479] The Court observed that as a matter of Delaware statute, a charter may regulate "intra-corporate affairs"—all matters "defining, limiting and regulating the powers of the corporation, the directors and the stockholders," and that because a Securities Act claim may raise such matters, such a federal forum provision is not necessarily invalid. The Court's reasoning applies to the inclusion of such provisions

in bylaws as well. Importantly, the Court's decision rejected a facial challenge to such federal forum provisions, but did not endorse their application in every circumstance.[480] In its 2021 voting policy, ISS for the first time expressly recognized the benefits of Delaware choice of forum provisions for Delaware corporations. Until then, ISS had taken the position that unilateral adoption by the board of an exclusive forum provision would be evaluated under ISS policy on unilateral bylaw and charter amendments. Under the new policy, ISS will "[g]enerally vote for charter or bylaw provisions that specify courts located within the state of Delaware as the exclusive forum for corporate law matters for Delaware corporations, in the absence of serious concerns about corporate governance or board responsiveness to shareholders." Similarly, ISS will "[g]enerally vote for federal forum selection provisions in the charter or bylaws that specify 'the district courts of the United States' as the exclusive forum for federal securities law matters, in the absence of serious concerns about corporate governance or board responsiveness to shareholders."

Glass Lewis' policy continues to take a negative view of forum selection provisions, and recommends that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision unless the company: (i) provides a compelling argument on why the provision would directly benefit shareholders; (ii) provides evidence of abuse of legal process in other, non-favored jurisdictions; (iii) narrowly tailors such provision to the risks involved; and (iv) maintains a strong record of good corporate governance practices. If a board seeks shareholder approval of a forum selection clause pursuant to a bundled bylaw amendment rather than as a separate proposal, Glass Lewis will recommend voting against the chair of the governance committee for bundling disparate proposals into a single proposal.

7. Fee-Shifting Bylaws

Although it is common in some jurisdictions outside the United States for the losing party to pay the prevailing party's attorneys' fees and costs, under the majority rule in the United States each party must pay its own attorneys' fees and costs, regardless of the outcome of the litigation. The Delaware Supreme Court in *ATP Tour, Inc.* v. *Deutscher Tennis Bund*, on a question of law certified to it from the District Court for the District of Delaware, held that a board-adopted fee-shifting bylaw that imposed the costs of litigation on a non-prevailing plaintiff in a private non-stock corporation is facially valid under Delaware law.[481] In so ruling, the Delaware Supreme Court recognized that a "bylaw that allocates risk among parties in intra-corporate litigation" relates to the conduct of the affairs of the corporation.[482] The Delaware Supreme Court cautioned that a fee-shifting bylaw enacted for an improper purpose would be invalid, even if the board had authority to adopt it in the first instance.

In response to the *ATP* case, the Delaware legislature adopted amendments to the DGCL providing that neither the certificate of incorporation nor the bylaws may contain "any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim."[483] Although the statutory amendments bar fee-shifting provisions in stock

corporations, they specifically do not apply to non-stock corporations, and thus leave the holding of *ATP* intact. In 2016, the Delaware Court of Chancery struck down a bylaw that purported to shift fees for any stockholder bringing an action in violation of the corporation's forum selection bylaw, thus confirming that Section 109(b) of the DGCL bars even limited fee-shifting bylaws for public corporations.[484] ISS and Glass Lewis also look unfavorably on companies that adopt fee-shifting provisions in their bylaws.

D. Change-of-Control Employment Arrangements

In order to attract and retain executives, most major companies have adopted executive compensation programs containing change-of-control protections for senior management. Change-of-control employment agreements or severance plans are not defensive devices intended to deter sales or mergers. Instead, they are intended to ensure that management teams are not deterred from engaging in corporate transactions that are in the best interests of shareholders on account of the potential adverse effects those transactions may have on management's post-transaction employment. A well-designed change-of-control employment agreement or severance plan should neither incentivize nor disincentivize management from engaging in a transaction on the basis of personal circumstances. Additionally, such arrangements assist in retaining management through a period of uncertainty during which executives would otherwise have significant incentive to pursue alternative opportunities.

Although there continues to be a great deal of scrutiny of executive compensation arrangements, appropriately structured change of control employment agreements are both legal and proper. Courts that have addressed the legality of change of control agreements and other benefit protections have almost universally found such arrangements to be enforceable and consistent with directors' fiduciary duties so long as such directors do not have a conflict of interest.[485] A board's decision to adopt change-of-control provisions is usually analyzed under the business judgment rule.[486] The scrutiny applied to such arrangements may be heightened if they are adopted during a pending or threatened takeover contest, thereby making careful planning in advance of a merger all the more important. Public companies that do not already maintain reasonable change-of-control protections for senior management should consider implementing them, and companies that already maintain such arrangements should monitor and periodically review them.

Over the years, a generally consistent form of change of control employment agreement or plan has emerged. Typically, the protections of the agreement or plan become effective only upon a change of control or in the event of a termination of employment in anticipation of a change of control. A protected period of two years following a change-of-control is fairly typical. If the executive's employment is terminated during the protected period by the employer without cause or by the executive following a specified adverse change in the terms of employment, the executive is entitled to severance benefits.

The severance benefits must be sufficient to ensure neutrality and retention, but not so high as to be excessive or to encourage the executive to seek a change of control when it is not in the best interests of the company and its shareholders. For the most senior executives at public companies, a multiple of an executive's annual compensation (*e.g.*, two or three times) is the standard severance formula in most industries. "Compensation" for this purpose generally includes base salary and annual bonus (based on a fixed formula, usually related to the highest or average annual bonus over some period, or target bonus) and in some cases, accruals under qualified and supplemental defined benefit pension plans. In addition, severance benefits typically include welfare benefit continuation during the severance period. In the change-of-control context, severance is customarily paid in a lump sum within a specified period of time following a qualifying termination, as opposed to installment payments, which prolong a potentially strained relationship between the executive and the former employer.

Many change-of-control agreements incorporate provisions to address the impact of the federal excise tax on excess parachute payments. The "golden parachute" tax rules subject "excess parachute payments" to a dual penalty: the imposition of a 20% excise tax upon the recipient and non-deductibility by the paying corporation. Excess parachute payments result if the aggregate payments received by certain executives of the company that are treated as "contingent" on a change of control equal or exceed three times the individual's "base amount" (the average annual taxable compensation of the individual for the five or lesser number of years during which the employee was employed by the corporation preceding the year in which the change of control occurs). If the parachute payments to such an individual equal or exceed three times the "base amount," the "excess parachute payments" generally equal the excess of the parachute payments over the employee's base amount. Historically, many public companies provided a "gross-up" for the golden parachute excise tax to their most senior executives. In recent years, however, there has been increasing shareholder pressure against gross-ups, and they have become much less common.

Companies should periodically analyze the impact the golden parachute excise tax would have in the event of a hypothetical change of control. The excise tax rules, for a variety of reasons, can produce arbitrary and counter-intuitive outcomes that penalize long-serving employees as compared to new hires, promoted employees as compared to those who have not been promoted, employees who do not exercise options compared to those who do, employees who elect to defer compensation relative to those who do not, and that disadvantage companies and executives whose equity compensation programs include performance goals. Indeed, companies historically implemented gross-ups because they were concerned that the vagaries of the excise tax would otherwise significantly reduce the benefits intended to be provided under the agreement and that such a reduction might undermine the shareholder-driven goals of the agreement. As gross-ups have become less prevalent, the importance of understanding the impact of the excise tax has increased, and companies and executives should consider excise tax impact and mitigation techniques in the context of compensation design.

In addition to individual change of control agreements, some companies have adopted so-called "tin parachutes" for less senior executives in order to formalize company policies regarding severance in the change of control context. Because of the number of employees involved, careful attention should be paid to the potential cost of such arrangements and their effect on potential transactions, but well-designed broad-based severance arrangements can help ensure stability across a company's workforce at a time when the company is otherwise vulnerable to attrition.

Companies should also review the potential impact of a change of control on their stock-based compensation plans. Because a principal purpose of providing employees with equity incentives is to align their interests with those of the shareholders, plans should contain provisions for the acceleration of equity compensation awards upon a change-of-control ("single-trigger") or upon a severance-qualifying termination event following a change-of-control ("double-trigger"). There has been a trend in recent years towards double-trigger vesting, although a significant minority of public companies still provide for single-trigger vesting. Additionally, companies should confirm that their stock-based plans include adjustment clauses authorizing the company to make appropriate modifications to awards in the event of a transaction—*e.g.*, conversion of target awards into acquiror awards of comparable value.

Companies can expect continuing shareholder scrutiny of change-of-control employment arrangements, which generally receive attention in connection with the non-binding "say-on-pay" shareholder advisory votes on executive compensation in annual proxy statements, and which are also subject to a precatory vote in transaction proxy statements. Heightened disclosure requirements regarding golden parachutes are triggered where shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all of the assets of a company. Furthermore, ISS and other shareholder advisory groups continue to criticize certain change-of-control practices such as excise tax gross-ups, single-trigger equity award vesting and post-retirement perks. Notwithstanding this increased scrutiny, companies should assess these and other executive compensation arrangements in light of company-specific needs, rather than broad policy mandates.

E. "Poison Puts"

Debt instruments may include provisions, sometimes known as "poison puts," that allow debtholders to sell or "put" their bonds back to the issuing corporation at a predetermined price, typically at par or slightly above par value, if a defined "change-of-control" event occurs. Poison puts began to appear in bond indentures during the LBO boom of the 1980s in response to acquirors' practice of levering up targets with new debt, which in turn led to ratings downgrades and a decline in the prices of the targets' existing bonds. The inclusion of these protections, which generally cover mergers, asset sales and other change-of-control transactions, as well as changes in a majority of the board that is not approved by the existing directors (the latter being sometimes referred to as a "proxy put"), is generally bargained for by debtholders and therefore is assumed to lead to better terms (such as lower pricing) for the borrower.

Proxy puts have come under fire in Delaware courts because of their perceived use as an entrenchment device. In 2009, in *San Antonio Fire & Police Pension Fund* v. *Amylin Pharmaceuticals*, *Inc.*, the Delaware Court of Chancery held that the board has the power, and so long as it is complying with the contractual implied duty of good faith and fair dealing to the debtholders, also the right, to "approve" a dissident slate of director nominees for purposes of a proxy put in the company's bond indenture, even while the board is conducting a public campaign against them.[487] An indenture that precluded the board from deciding whether or not to "approve" the slate (known as a "dead hand proxy put") would have "an eviscerating effect on the stockholder franchise" and would "raise grave concerns" about the board's fiduciary duties in agreeing to such a provision.[488] The Court also clarified that the board is "under absolutely *no* obligation to consider the interests of the noteholders" in determining whether to approve the dissident slate.[489]

In its 2013 decision in *Kallick* v. *SandRidge Energy, Inc.*, the Delaware Court of Chancery cast further doubt on the effectiveness of proxy puts. *SandRidge* applied *Unocal*'s intermediate standard of review both to a board's decision to agree to poison put provisions in the first place and its subsequent conduct with respect to such clauses.[490] Citing *Amylin*, then-Chancellor Strine held that a board must approve a dissident slate for purposes of a proxy put unless "the board determines that passing control to the slate would constitute a breach of the duty of loyalty, in particular, because the proposed slate poses a danger that the company would not honor its legal duty to repay its creditors."[491] According to then-Chancellor Strine, a board may only decline to approve dissident nominees where the board can "identify that there is a specific and substantial risk to the corporation or its creditors posed by the rival slate" (such as by showing the nominees "lack the integrity, character, and basic competence to serve in office," or where the dissident slate has announced plans that might affect the company's ability to "repay its creditors.")[492] Thus, even though the SandRidge board believed itself to be better qualified and prepared to run the company than the dissident nominees, the Court enjoined the incumbent directors from opposing a control contest until they approved their rivals so as to satisfy the put.[493]

In 2014, the Delaware Court of Chancery, in *Pontiac General Employees Retirement* v. *Ballantine* (also known as "*Healthways*"), expressed further skepticism that proxy puts could be employed in a manner consistent with a board's fiduciary duties. In *Healthways*, a company entered into restated credit and term loan agreement with a dead hand proxy put. Two years later, an 11% stockholder, North Tide Capital, sent a critical letter to the board and threatened to wage a proxy fight, which was ultimately settled when the company agreed to nominate three North Tide candidates to the board.[494] The board was then sued by stockholders, who argued that the directors breached their fiduciary duties by approving a credit agreement with a dead hand proxy put. Because the proxy fight with North Tide Capital had settled, the defendants argued that there was no present risk that the poison put would trigger and that therefore the case was not ripe.[495] Vice Chancellor Laster disagreed. He concluded that dead hand proxy puts have a deterrent effect and since "[a] truly effective deterrent is never triggered,"[496] the poison

put could chill shareholder action even without an actual proxy contest underway.[497] The Court thus concluded that approving a dead hand proxy put could subject directors to personal liability for breaching their fiduciary duty of loyalty, and could open up financing sources to liability for aiding and abetting the breach.[498] Unsurprisingly, class actions alleging breaches of directors' fiduciary duties on the basis of proxy put provisions are on the rise nationwide.[499]

Because of the case law described above, the Delaware Court of Chancery's 2015 pronouncement that a proxy put might be so difficult to use that it is akin to a "toothless bulldog" rings true.[500] Indeed, when the case was later settled, the credit agreement was amended to eliminate the proxy put (without any payment to the lenders for agreeing to the amendment) and the company agreed to pay up to $1.2 million in attorneys' fees.

Boards considering adoption of poison puts, and possibly other change-of-control agreements, should be aware that the adoption itself, as well as a board's decisions with respect to such instruments, may be challenged and reviewed by a skeptical court. Courts recognize, of course, that lenders may legitimately demand these positions and that companies may benefit from their use. But because courts may view poison puts as having an entrenching effect, the board should weigh the appearance of entrenchment against the needs of the lender and document carefully the process it followed. At least one board has heeded the warning—at the outset of a contested proxy contest, Morgans Hotel pre-approved the dissident's slate of nominees as continuing directors, so as not to trigger the change-of-control covenant in Morgans Hotel's notes.

F. Planning an Unsolicited Offer

For would-be unsolicited bidders, a variety of tactical and strategic considerations must be carefully balanced at every stage of planning and implementing a transaction. It is important for bidders not to underestimate the time and effort that will be required to succeed, nor to overestimate the chance of success—year in and year out, a significant large percentage of announced unsolicited transactions are either withdrawn or culminate with the target entering into a deal with a different third party.

1. Private Versus Public Forms of Approach

Because of the difficulty of acquiring control of a target without the support of its board, initial takeover approaches tend to be made privately and indicate a desire to agree to a negotiated transaction. Acquirors generally begin their approach with either: (i) a "casual pass" where a member of the acquiror's management will contact a senior executive or director of the target and indicate the desire to discuss a transaction; or (ii) through a private bear-hug letter. Bear-hug letters come in various forms and levels of specificity but generally are viewed as a formal proposal to the target to engage in a transaction, and in certain circumstances may be interpreted by the target as triggering a disclosure obligation.

A key tactical consideration for an acquiror in this context is whether to suggest, implicitly or explicitly, that the acquiror is willing to take the proposal directly to the target's shareholders if a negotiated deal is not reached. One the one hand, from the acquiror's perspective, a public approach may be advantageous in maximizing shareholder and public pressure on the target board to enter into negotiations. In this context, it may be difficult in practice for a target board to refuse to engage, regardless of how strong the target's structural takeover defenses may be.

On the other hand, a public approach or leak may disadvantage the bidder in a number of ways: it will typically cause the target's stock price to increase; it may decrease the likelihood of receiving due diligence access and otherwise reaching a negotiated transaction, which, among other things, makes obtaining regulatory approvals more challenging; it may distract or strain the target's management, employees and business relationships in ways that decrease value; and it may negatively affect the bidder's own stock price, decreasing the value or increasing the dilutive effect of any consideration proposed to be paid in bidder stock.

2. Other Considerations

In considering whether and how to make an unsolicited approach, an acquiror must carefully review the target's structural takeover defenses, including an assessment of the target's charter and bylaws and any "interested stockholder" or other anti-takeover statutes that may be applicable in the target's jurisdiction of incorporation. Among other things, acquirors that may seek shareholder approval of proposals to facilitate the acquisition must be mindful of the advance notice deadlines for submitting board nominees and shareholder proposals at the target's annual meeting, especially in cases where the target does not permit shareholders to act by written consent or call a special meeting. As a proxy fight remains the key pressure tactic to encourage a reluctant target board to engage with an unsolicited acquiror, a hostile approach ideally should be made at a time in the target's meeting cycle when a proxy fight is a credible, near-term threat. Potential acquirors considering running a proxy fight should understand that it requires considerable effort and lead time to recruit a slate of nominees with the appropriate industry experience and technical skills to credibly challenge an incumbent board.

A thorough understanding of the target's shareholder base is also critical. For example, overlapping shareholders may be important proponents of a transaction, while a high level of insider ownership at the target could make it more difficult to apply pressure to engage. The presence of shareholder activists in the target's stock may be a double-edged sword, as they can be both instigators of engagement by the target but may also press the acquiror to raise its price in order to obtain their support. Similarly, acquirors should consider the extent to which the target's institutional shareholder base consists of index funds rather than active managers. Index funds may be less likely to tender into a hostile tender or exchange offer. If a hostile approach develops into a proxy fight, index funds generally have different criteria than active managers in determining whether to vote for the acquiror's director slate, including a focus on governance issues and the need

to replicate but not necessarily beat the index that may not be relevant to active managers who are more focused on price.

Acquirors must also consider the potential unintended consequences of making a takeover approach, especially one that becomes public. The target may launch an aggressive public relations campaign questioning the merits, or even the legality of the combination or the acquiror's tactics in pursuing it (*e.g.*, from an antitrust, securities or state corporate law perspective) and commence litigation in that regard. Especially if the acquiror proposes to use its stock as transaction consideration, targets also often publicly question the acquiror's accounting practices, growth prospects, synergies from the proposed combination or the sustainability of the acquiror's business. Finally, acquirors may themselves become the subject of takeover interest from third parties.

3. Disclosure Issues for 13D Filers

Schedule 13D is generally required to be filed by 5% shareholders of U.S. public companies, other than passive institutional investors and pre-IPO owners. The schedule requires disclosure of the purposes of the filer's acquisition, including any plans or proposals relating to significant transactions involving the target, and any material changes to its previous 13D disclosures.

Acquirors that are existing large shareholders of the target and subject to the SEC's 13D reporting requirements must carefully evaluate the point at which any plans or proposals should be publicly disclosed. Historically, acquirors often only filed 13D amendments upon signing of a merger agreement (in a friendly transaction) or when the acquiror otherwise decided for strategic reasons to publicly announce a bid/proposal. However, in recent years, the SEC has charged directors, officers and major shareholders of issuers for failing timely to disclose in Schedule 13Ds steps taken to take the issuers private, resulting in cease-and-desist orders and payment of civil penalties.[501] The SEC actions indicate that the SEC may focus on 13D compliance in the going-private context and acquirors should carefully evaluate when 13D disclosure is warranted in a given situation.

G. Responding to an Unsolicited Offer—Preliminary Considerations

Takeover preparedness remains critical in today's M&A environment. Failure to prepare for a takeover attempt exposes potential targets to pressure tactics and reduces the target's ability to control its own destiny. Further, while takeover defense is more art than science, there are some generally applicable principles to which companies should typically adhere.

1. Disclosure of Takeover Approaches and Preliminary Negotiations

When a takeover approach is made, keeping the situation private is generally preferable as it is much easier to defeat an unsolicited bid if it never becomes public. Once a takeover approach becomes public, a target company's options narrow

dramatically because arbitrageurs and hedge funds often take positions in its stock, changing its shareholder base. These short-term investors' objectives will necessarily conflict with the company's pursuit of a standing, long-term plan and they will most often apply pressure to the board to accept a bid, with less regard to its adequacy. Because there are a limited number of ways to acquire control of a target without the support of its board—*i.e.*, through a tender offer, a stock purchase, or a combined tender offer and proxy contest—and each available hostile acquisition method is riskier and provides less certainty for the potential acquiror than a negotiated transaction, most initial takeover approaches are made privately and indicate a desire to agree to a friendly transaction. Determining if disclosure is required in response to a private takeover approach or preliminary merger negotiations is a factually driven inquiry. The two guiding factors in this inquiry are: (i) whether information about the acquisition proposal is material and (ii) whether the target has a duty to disclose the approach.

The materiality of speculative events such as preliminary merger negotiations is determined based on the particular facts of each case by applying the U.S. Supreme Court's test in *Basic* v. *Levinson*[502]: whether, balancing the probability that the transaction will be completed and the magnitude of the transaction's effect on the issuer's securities, there is a substantial likelihood that the disclosure would be viewed by the reasonable investor as having significantly altered the total mix of information. To assess probability, companies must look at the "indicia of interest in the transaction at the highest corporate levels" considering, among other things, board resolutions, instructions to investment bankers, and actual negotiations between the parties. The magnitude of the transaction on the issuer's securities is determined by reference to the size of the two corporate entities and the potential premium over market value. However, "[n]o particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material."[503]

Even if preliminary merger negotiations are material, no disclosure is required absent an affirmative disclosure duty.[504] A corporation is not required to disclose a fact merely because reasonable investors would like to know it.[505] However, an acquiror's acquisition of a toehold position in the target's stock or rumors regarding a potential transaction may occasionally lead to inquiries directed at the target. Consequently, disclosure duties most commonly arise in two situations: (i) when subsequent factual developments occur that make the issuer's previous statements misleading or (ii) when leaks and market rumors are attributable to the issuer.

In a 2018 decision, the Tenth Circuit held that a party engaged in merger discussions had no duty to disclose such discussions when it had not made any statements that were "inconsistent" with the existence of such discussions. In addition, it found that such discussions were not material under the *Basic* v. *Levinson* test "in the absence of a serious commitment to consummate the transaction."[506]

As a general matter, a company is not required to disclose approaches and negotiations in response to inquiries.[507] However, if a target elects to speak publicly about mergers or acquisitions, it must speak truthfully and completely.[508] Therefore, in

most situations, the best response is a "no comment" posture, and many companies maintain a policy of not commenting on market rumors or takeover speculation so as to provide a principled basis for a decision not to comment. A "no comment" response may not be appropriate if the issuer had previously made a statement that has been rendered materially false or misleading as a result of subsequent events.[509]

Similarly, a company cannot reply "no comment" in response to inquiries about unusual market activity or rumors if the leak is attributable to the company.[510] However, if the leak is not attributable to the company, there is no duty to correct the market or verify the rumor.[511] Market rumors and leaks are attributed to a company if it has "sufficiently entangled itself" with the disclosure of information giving rise to the rumor.[512] In *State Teachers Retirement Board* v. *Fluor*,[513] Fluor, a construction company, was awarded a $1 billion contract to build a coal gasification plant in South Africa and, prior to publicly disclosing the award of the contract, its share price surged and daily trading volume increased threefold. Fluor received several inquiries from market analysts and reporters regarding rumors of the contract award but Fluor declined to comment due to contractual restrictions.[514] The Second Circuit held that the company's decision not to confirm the rumors could not give rise to liability because there was no indication that the leak was attributable to the company or its employees.[515] However, while courts have not required disclosure in response to rumors and leaks that are not attributable to the company, stock exchange rules, subject to certain exceptions, impose prompt disclosure duties to combat unusual market activity.[516]

2. Other Considerations

In addition to keeping the situation private, all communications from and to an acquiror should be directed through the CEO unless otherwise decided by the board. Acquirors often will attempt to contact individual board members directly in order to undermine the target's ability to present a unified negotiating front or to learn information. Additionally, maintaining board unity is essential to producing the best outcome, whether the goal is independence or negotiating the best possible sale price. In this regard, the CEO should keep the board informed of developments, consult the board and solicit its advice. Honest and open debate should be encouraged, but kept within the boardroom.

During a takeover defense, every decision is tactical and must align with the target's defensive strategy. No conversation with a hostile bidder should be assumed to be off the record and any signs of encouragement, self-criticism or dissension within the board can be used against the company. Consequently, the board should carefully craft a formal response. Except in the case of a publicly disclosed tender offer, there is no defined period in which a company must respond to an offer. And, there is no duty to negotiate, even in the face of a premium bid.

H. Defending Against an Unsolicited Offer

1. "Just Say No"

Unless the target has otherwise subjected itself to *Revlon* duties (*e.g.*, by having previously agreed to enter into an acquisition involving a change-of-control, as in *QVC*), it seems clear that the target may, if it meets the relevant standard, "just say no" to an acquisition proposal.

Targets of unsolicited offers have been successful in rejecting such proposals in order to follow their own strategic plans. In response to a hostile bid by Moore, Wallace Computer Services relied on its rights plan and long-term strategy, rather than seeking a white knight, initiating a share repurchase program or electing another "active" response to Moore's offer. When Moore challenged the rights plan in Delaware federal district court, Wallace was able to support its refusal to redeem the pill under the *Unocal* standard. Although 73% of Wallace's shareholders tendered into Moore's offer, the Court found that the Wallace board had sustained its burden of demonstrating a "good faith belief, made after reasonable investigation, that the Moore offer posed a legally cognizable threat" to Wallace. The evidence showed that the favorable results from a recently adopted capital expenditure plan were "beginning to be translated into financial results, which even surpass management and financial analyst projections."[517] As the *Moore* decision illustrates, where the target of a hostile bid wishes to consider rejecting the bid and remaining independent, it is critical that the board follow the correct process, including having a thorough record of its deliberations in its board minutes, and have the advice of an experienced investment banker and legal counsel.

The ability of a board to reject an unsolicited offer by relying on its rights plan was reaffirmed in *Airgas*, as discussed in Sections II.B.2.b and VI.A.2. The Airgas board rejected a series of increasing tender offers from Air Products because it found the price to be inadequate, and the Delaware Court of Chancery upheld the primacy of the board's determination, even though Airgas had lost a proxy fight to Air Products for one-third of the company's staggered board.[518]

However, while a rights plan is often the most useful tool for staving off a hostile bid, it is not necessary to successfully "just say no" in every situation. What is typically necessary—and what a rights plan is designed to protect—is a thoughtful long-term plan that was developed by a board and management whom long-term shareholders trust to deliver value.

This proposition was on full display in Perrigo's 2015 defense of Mylan's $35.6 billion takeover bid—the largest hostile takeover battle in history to go to the tender offer deadline. In April 2015, Mylan made an exchange offer to acquire Perrigo (which had inverted from Michigan to Ireland). Perrigo's board rejected the bid because it believed it undervalued the company. As an Irish company, Perrigo was prevented from adopting typical, U.S.-style defenses, such as a rights plan, by a prohibition under the Irish Takeover Rules on the taking of "frustrating actions" in response to a bid.

Consequently, Perrigo's best defense was to convince its shareholders that the value of a stand-alone Perrigo exceeded the value of a combined Mylan/Perrigo *plus* the offer's cash consideration and that the risk of owning Mylan shares—from a valuation and governance perspective—was significant. Ultimately, more than 60% of Perrigo's shareholders rejected Mylan's bid, which resulted in the failure to satisfy the minimum tender condition and defeated the takeover attempt.

While Mylan's bid was outstanding, there was considerable speculation about whether merger arbitrageurs seeking short-term gains, who had acquired almost 25% of Perrigo's shares, would be able to deliver Perrigo into Mylan's hands. Much was also made of the fact that Perrigo did not agree to sell to a white knight or to do a large acquisition of its own, raising questions about whether a premium offer, even a questionable one, had put Perrigo on a "shot clock" to do the least bad deal that it could find. It did not. The Perrigo situation shows that a target company can win a takeover battle and defeat short-term pressures by pursuing a shareholder-focused stand-alone strategy, especially where it fights for and wins the backing of its long-term shareholders.

2. White Knights and White Squires

A white knight transaction, namely a merger or acquisition transaction by the target with a friendly acquiror in the face of a hostile takeover bid, can be a successful strategy where the white knight transaction provides greater economic value to target company shareholders than the initial hostile offer. In some contexts, however, white knight transactions are more difficult to accomplish because of required regulatory approvals and related procedures. For example, a white knight will usually require the same regulatory approvals as are required by the hostile acquiror and, to the extent that the white knight commences the approval process after the hostile acquiror does, the white knight may suffer a timing disadvantage. If a target has defended itself against the hostile acquiror by arguing that the industry is highly concentrated and the deal is subject to antitrust risk, such arguments may be used against a proposed combination between the target and a white knight in the same industry as well. Certain target companies may also be constrained by a scarcity of available acquirors, depending upon applicable regulatory restrictions and antitrust considerations.

Allergan's response to a 2014 hostile takeover offer by Valeant and Pershing Square illustrates the viability of a white knight strategy. Pershing Square teamed up as a purported "co-offering person" with Valeant and sought to avoid the securities laws designed to prevent secret accumulation of stock as well as the Hart-Scott-Rodino notification requirements. The pair formed a purchasing vehicle (funded primarily by Pershing Square) to purchase a large block in Allergan using stock options instead of shares of common stock to avoid triggering Hart-Scott-Rodino notification. They also took advantage of the 10-day reporting window to acquire more stock until they held nearly 10% of the outstanding shares and then simultaneously announced both their combined ownership stake and a proposed merger between Valeant and Allergan. Soon thereafter, Allergan's board adopted a rights plan and rejected Valeant's undervalued bid and cost-cutting strategy. Several months later Valeant launched an exchange offer for

Allergan's shares that Allergan's board rejected as "grossly inadequate." After several months, Allergan announced that it would be acquired by Actavis at a much higher premium. Serious questions have been raised about the "co-offer person" structure employed by Valeant and Pershing Square.[519] In a tentative ruling in December 2017 in a lawsuit brought by Allergan shareholders who had sold shares while Pershing Square was secretly acquiring its stakeholding position, a federal court concluded that Pershing Square and Valeant could be liable for damages for insider trading in violation of federal securities laws. Pershing Square and Valeant agreed to pay approximately $290 million to settle the insider trading claims.

A white squire defense, which involves placing a block of voting stock in friendly hands, may be more quickly implemented. This defense has been successfully employed in a handful of instances, and the Delaware Court of Chancery has upheld the validity of this defense under the right circumstances.[520] Such sales to "friendly" parties should be carefully structured to avoid an unintended subsequent takeover bid by the former "friend." Voting and standstill agreements are critical components in this context.

Note that where a company is the target of a tender offer, Schedule 14d-9 requires enhanced disclosures relating to its pursuit of alternative transactions to the tender offer, such as when the target is pursuing a white knight or white squire defense. Targets of a tender offer must disclose whether they are "undertaking or engaged in any negotiations in response to the tender offer that relate to . . . [a] tender offer or other acquisition of the [target] company's securities" as well as "any transaction, board resolution, agreement in principle, or signed contract that is entered into in response to the tender offer that relates to" such undertaking or negotiations in response to the tender offer.[521] These disclosure obligations risk making certain negotiations public before the target has a fully negotiated transaction with a third party. Accordingly, these disclosure obligations need to be carefully reviewed and managed where a tender offer target is considering alternative transactions as a takeover defense.

3. Restructuring Defenses

Restructurings may be driven in part by the threat of hostile takeovers. The failure of a company's stock price to fully reflect the value of its various businesses has provided opportunities for acquirors to profit by acquiring a company, breaking it up, and selling the separate pieces for substantially more than was paid for the entire company. A primary goal of any restructuring is to cause the value of a company's various businesses to be better understood and, ultimately, to be better reflected in its stock price.

Like many forms of takeover defenses, a restructuring is best initiated well before a company is actually facing a bid. In most cases, a restructuring will only be possible if there has been careful advance preparation by the company and its investment bankers and counsel. Arranging for a friendly buyer of a particular asset and restructuring a business to accommodate the loss of the asset are time-consuming, costly and complicated endeavors and are difficult to effect in the midst of a takeover battle.

Nonetheless, restructuring defenses have been attempted or implemented in a number of prominent transactions. For example, during the course of BHP Billiton's effort to acquire global mining giant Rio Tinto, Rio Tinto announced in late 2007 its decision to divest its aluminum products business (Alcan Engineered Products) and instead focus on its upstream mining businesses. BHP ultimately dropped its bid for Rio Tinto in November 2008, although it publicly attributed this decision to turmoil in the financial markets, uncertainty about the global economic outlook and regulatory concerns.

In addition to asset sales, a stock repurchase plan, such as that pursued by Unitrin in response to American General's unsolicited bid, may be an effective response to a takeover threat. Buybacks at or slightly above the current market price allow shareholders to lock in current market values. Companies may also initiate such buybacks when they choose not to pursue other publicly announced acquisitions in order to prevent a deterioration in the stock price and/or to reduce vulnerability to unsolicited offers. A principal benefit of stock buybacks is that they may be quickly implemented, typically through either a self-tender offer or an open market buyback program.

4. Making an Acquisition and the "Pac-Man" Defense

Companies can fend off an unwanted suitor by making an acquisition using either stock consideration or issuing new debt. Acquiring a company with stock consideration has the effect of diluting the suitor's ownership interest if it has purchased a toehold in the target. An acquisition can also make the cost of a transaction significantly greater. In 2008, Anheuser-Busch considered acquiring Grupo Modelo in order to make the brewer too large for InBev to purchase the company. More recently, Jos. A. Bank agreed to buy retailer Eddie Bauer to make an acquisition by Men's Warehouse more difficult.

The "Pac-Man" defense involves a target company countering an unwanted acquisition proposal by making its own proposal to acquire the would-be acquiror.[522] The Pac-Man defense recognizes that a transaction is appropriate while challenging which party should control the combined entity. This tactic first arose in the 1980s when Martin Marietta was the target of a hostile takeover bid by Bendix and launched its own hostile bid for Bendix. Men's Warehouse also employed the Pac-Man defense in late 2013 to reverse an offer by Jos. A. Bank in a move that resulted in Men's Warehouse buying Jos. A. Bank in 2014. In the face of a premium offer, however, the Pac-Man defense can be an uphill battle, as the initial target is effectively tasked with convincing its shareholders that control of the combined company by the initial target's management will create more value for them than the proposed premium. At the same time, companies considering making public or private unsolicited acquisition proposals, especially for a larger or comparably sized target, need to be cognizant that the proposal could ultimately result in a combination of the companies on very different terms than originally proposed, including as to the identity of the surviving company. For example, in 2017, Penn National Gaming successfully acquired Pinnacle Entertainment in a cash and stock transaction following an initial private unsolicited acquisition proposal from Pinnacle to acquire Penn National for all cash.

5. Corporate Spin-Offs, Split-Offs and Split-Ups

Companies have used spin-offs, split-offs and similar transactions to enhance shareholder value and, in some cases, to frustrate hostile acquisition attempts. One means of focusing stock market attention on a company's underlying assets is to place desirable assets in a corporation and exchange shares of the new company for shares of the parent company (known as a "split-off"), which usually is done after issuing some shares of the new company in an initial public offering. Another method, known as a "spin-off," is to distribute all of the shares of the new company to the parent company's shareholders as a dividend. The Delaware Court of Chancery has ruled that in a spin-off, barring exceptional circumstances, a company will be able to make a clean break between the two entities, and release liabilities between the entities.[523] Another means of boosting the share price of a company is to "split up" (*i.e.*, to sell off businesses that no longer fit the company's strategic plans or split the company into logically separate units). In all of these cases, a company tries to focus the market's attention on its individual businesses which, when viewed separately, may enjoy a higher market valuation than when viewed together.

In addition to potentially increasing target company valuations, spin-offs and similar structures may produce tax consequences that discourage takeover attempts for a limited period of time.

6. Litigation Defenses

As shown by the litigation between Vulcan and Martin Marietta, discussed previously in Section III.A.1, a successful litigation strategy can delay, if not entirely eliminate, a hostile threat. As a remedy for Martin Marietta's breach of two binding confidentiality agreements, the Delaware Court of Chancery enjoined Martin Marietta from prosecuting a proxy contest, making an exchange offer, or otherwise seeking to acquire Vulcan assets for a period of four months. In light of Vulcan's staggered board, the ruling had the practical effect of delaying Martin Marietta's ability to win a proxy fight (and thereby seating directors more likely to favor a combination of the two companies) by an entire year. While Delaware courts do not regularly enjoin transactions, they are able and willing to do so when there is a clear record and a compelling legal theory to support such a decision.

The potential merit of a litigation defense was again shown in *Depomed Inc.* v. *Horizon Pharma, PLC*[524] in 2015, when a California court preliminarily enjoined a hostile bidder on the ground that it misused information in violation of a confidentiality agreement, effectively ending the hostile takeover attempt, as discussed previously in Section III.A.1. Both of these cases illustrate that a company faced with a takeover threat should closely analyze its prior contractual dealings with the hostile acquiror and other entities and not shy away from using courts to enforce its rights.

7. Regulatory and Political Defenses

Targets of unsolicited takeover approaches have sometimes raised concerns regarding a bidder's ability to obtain the required antitrust or other regulatory approvals to close a transaction as a means of defending against an unwanted approach. Antitrust concerns are commonly raised in this context, as Syngenta did in rejecting Monsanto's 2015 takeover approach and United Technologies did in rejecting Honeywell's 2016 takeover approach. In addition, especially in the cross-border M&A context, companies in industries that are politically sensitive or that are otherwise thought of as "national champions," have at times attempted to rally political and public opposition to unwanted takeover approaches. A relatively recent notable example of this approach was taken by Qualcomm in response to Broadcom's unsolicited proposal in 2017, resulting in the White House blocking Broadcom from proceeding with its bid on CFIUS grounds. Because these types of regulatory and political defenses can be difficult to reverse once they have been rolled out, practitioners generally consider them to be a "scorched earth" defense strategy that should only be employed in situations where the target is highly confident that it does not, and will not, wish to transact with the bidder.

VII.

Cross-Border Transactions

A. Overview

Globally, cross-border transactions totaled $2.1 trillion in 2021, which represented a 68% increase from 2020 and accounts for the strongest recorded full year period for cross-border M&A.[525] Cross-border transactions represented 36% of total global deal volume in 2021.[526] The sharp increase in cross-border deal activity reflects the strong rebound and recovery for overall transactions in 2021 as COVID-19-related shutdowns and border closures subsided, paving the way for restored global transacting.

Nonetheless, the COVID-19 pandemic and its impact on global supply chains remained a significant factor influencing cross-border deal activity throughout 2021. Despite the promise of global vaccination, easing of shutdown mandates and re-opening of borders, the Delta and Omicron variants rippled throughout the second half of 2021, leading to a surge of infection rates worldwide and contributing to supply chain disruptions and labor shortages. Other developments affecting cross-border deal activity in 2021 and thus far in 2022 have included enhanced foreign investment and competition merger review regimes, global trade tensions and geopolitical shifts and conflicts, including the ongoing war in Ukraine.

Over the last few years, various jurisdictions bolstered their foreign direct investment regimes, including the U.S. Department of Treasury adopting final regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), expanding the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS") review across various critical technology and infrastructure or sensitive data businesses, and President Trump's and President Biden's executive orders targeting increased regulatory oversight of companies operating in telecommunications or other industries that have potential links to China. The European Union similarly adopted a framework to screen foreign direct investments, which became fully operational in October 2020. The framework encourages member states to adopt a CFIUS-style foreign direct investment regime focusing on national security concerns, including the protection of critical infrastructure and technologies, and provides a consolidated mechanism through which member states can coordinate foreign direct investment review. More recently, the United Kingdom adopted an enhanced foreign investment regime (as discussed further below). In addition, several EU countries have introduced or enhanced foreign investment screening regimes in response to the COVID-19 pandemic, as governments feared that drops in valuation in the first half of 2020 could leave strategically important companies vulnerable to acquisition by foreign buyers. In industries with national security sensitivities, including pharmaceuticals, biotechnology and healthcare, these regimes can have a significant impact on how parties structure transactions and assess transaction risks when foreign parties are involved.

B. Special Considerations in Cross-Border Deals

With advance planning and careful attention to the greater complexity and spectrum of issues that characterize cross-border M&A, such transactions can be accomplished in most circumstances without falling into the pitfalls and misunderstandings that have sometimes characterized cross-cultural business dealings. A number of important issues should be considered in advance of any cross-border acquisition or strategic investment, whether the target is within the United States or elsewhere.

1. Political and Regulatory Considerations

Across jurisdictions, many parties and stakeholders have potential leverage (economic, political, regulatory, public relations, etc.), and consequently it is important to develop a plan to address anticipated concerns that may be voiced by these stakeholders in response to the transaction. Moreover, it is essential that a comprehensive communications plan be in place prior to the announcement of a transaction so that all of the relevant constituencies can be targeted and addressed with the appropriate messages. It is often useful to involve local public relations firms in the planning process at an early stage. Planning for premature leaks is also critical. Similarly, potential regulatory hurdles require sophisticated advance planning. In addition to securities and antitrust regulations, acquisitions may be subject to foreign investment review, and acquisitions in regulated industries (*e.g.*, energy, public utilities, gaming, insurance, telecommunications and media, financial institutions, transportation, semiconductor and defense contracting) may be subject to additional layers of regulatory approvals. Regulation in these areas is often complex, and political opponents, reluctant targets and competing bidders may seize on any perceived weaknesses in an acquiror's ability to clear regulatory obstacles. Most obstacles to a cross-border deal are best addressed in partnership with local players (including, in particular, the target company's management, where appropriate) whose interests are aligned with those of the acquiror, as local support reduces the appearance of a foreign threat.

It is in most cases critical that the likely concerns of national and local government agencies, employees, customers, suppliers, communities and other interested parties be thoroughly considered and, if possible, addressed prior to any acquisition or investment proposal becoming public. Flexibility in transaction structures, especially in strategic or politically sensitive situations, may be helpful in particular circumstances, such as: (i) no-governance or low-governance investments, minority positions or joint ventures, possibly with the right to increase to greater ownership or governance over time (though as discussed below, recently enacted legislation and related rulemaking may decrease the utility of these structures as tools to avoid regulatory scrutiny in the United States); (ii) when entering a foreign market, making an acquisition in partnership with a local company or management or in collaboration with a local source of financing or co-investor (such as a private equity firm); or (iii) utilizing a controlled or partly controlled

local acquisition vehicle, possibly with a board of directors having a substantial number of local citizens and a prominent local figure as a non-executive chairman. Use of preferred securities (rather than ordinary common stock) or structured debt securities should also be considered.

Occasionally, local regulators and constituencies may seek to intervene in global transactions. Ostensibly modest social issues, such as the name of the continuing enterprise and its corporate seat, or the choice of the nominal acquiror in a merger, may affect the perspective of government and labor officials. Depending on the industry involved and the geographic distribution of the workforce, labor unions and "works councils" may be active and play a significant role in the current political environment, and as a result, demand concessions. Burger King's 2014 acquisition of Tim Hortons is an example of how the perspective of local constituencies can influence transaction structure. Burger King agreed to list the new company on the Toronto Stock Exchange, reflecting the status of Tim Hortons as an iconic Canadian brand and local regulators' desire to maintain a Canadian listing. Similarly, in its attempted hostile acquisition of Perrigo, Mylan committed to list itself on the Tel Aviv Stock Exchange, regardless of the outcome of its offer, in part to portray a commitment to a long-term presence in Israel and appease Israeli securities regulators and Perrigo's Israeli shareholders. It was also reported that U.S.-based Praxair finally managed to agree to terms with the German company The Linde Group for a $35 billion merger only after the parties agreed to headquarter the combined company in a "neutral" European country (the location of which the parties described as a key "stumbling block" to the initial talks).

a. U.S. CFIUS Considerations

Recently, the impact of regulatory scrutiny of foreign investments has increased in the U.S. and in numerous jurisdictions around the world. In the United States, CFIUS is one of the key authorities to consider when seeking to clear acquisitions by non-U.S. acquirors. CFIUS is a multi-agency committee that reviews transactions for potential national security implications where non-U.S. persons or entities acquire "control" of, or certain non-controlling interests in, a U.S. business, or the transactions involve investments by non-U.S. governments or investments in U.S. critical infrastructure or technology, or businesses that have access to certain sensitive personal data of U.S. citizens. In recent years, some high-profile transactions have failed due to CFIUS hurdles—including Beijing Shiji Information Technology's investment in StayNTouch, a hotel software company, and Beijing Kunlun Tech's investment in Grindr, a dating app, two consummated transactions that President Trump ordered be unwound in March 2020 and November 2019, respectively; Broadcom's unsolicited takeover bid for Qualcomm, which President Trump blocked in 2018, citing national security concerns; MoneyGram's and Alibaba affiliate Ant Financial's proposed merger, which the parties terminated in 2018 following failure to gain CFIUS approval over concerns about protection of personal data; Chinese government-backed private equity fund Canyon Bridge Capital Partners' proposed acquisition of Lattice Semiconductor Corporation and a Chinese investment group's acquisition of Aixtron SE, a German semiconductor manufacturer,

blocked by executive orders from President Trump in September 2017 and then-President Obama in December 2016, respectively; and GO Scale Capital's acquisition of an 80.1% interest in Philips Lumileds Holding BV, which was abandoned in January 2016.

Most recently, in December 2021, Chinese private equity firm Wise Road Capital and Magnachip, a semiconductor company headquartered in South Korea, terminated the merger agreement providing for Wise Road's $1.4 billion acquisition of Magnachip following the parties' inability to obtain approval from CFIUS. The transaction, involving a Chinese acquiror and a South Korean target with little presence in the U.S. market, provides further evidence of CFIUS's expansive view of its jurisdiction. A notable aspect of the deal was CFIUS's issuance on June 15, 2021 of an interim order preventing Wise Road from completing the acquisition of Magnachip pending its review of the transaction.

CFIUS has also taken an interest in foreign businesses already operating in the U.S. and taken action in respect of their continued operation and ownership, for example in 2020 when CFIUS issued an order (which was ultimately not enforced) requiring Beijing-based ByteDance to divest its interest in TikTok as a result of concerns relating to collection and retention of data on U.S. persons by foreign persons.

In 2018, the United States enacted FIRRMA, the first noteworthy statutory amendments to CFIUS's scope and procedures in more than a decade. Certain portions of the legislation, including the expansion of the scope of covered transactions and the changes to filing timelines, were effective immediately, while the U.S. Department of Treasury issued final regulations in January 2020 and again in September 2020 to implement others, which became effective as of February 2020 and October 2020, respectively. On January 5, 2022, the U.S. Department of Treasury issued additional rules effective February 4, 2022 that effectively modify the reach of CFIUS's jurisdiction over certain excepted foreign investments. As FIRRMA has been implemented, the legislation has further heightened the role of CFIUS and the need to factor into deal analysis and planning the risks and timing of the CFIUS review process.

Among other things, FIRRMA expanded the scope of transactions that are subject to CFIUS's jurisdiction to include non-controlling investments by a foreign person in a U.S. business that owns, operates, manufactures, supplies or services critical infrastructure; produces, designs, tests, manufactures, fabricates or develops one or more critical technologies; or maintains or collects sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security, in each case where such foreign person has membership, observer or nomination rights on or with respect to the board of directors or similar decision-making body, has access to material non-public information, or has involvement (other than through voting of shares) in substantive decision-making of such U.S. business with respect to the use of such critical technologies or sensitive personal data, or in the management, operation, manufacture or supply of critical infrastructure. In addition, FIRRMA expanded the concept of critical technologies outside of those technologies covered by export control laws, to include emerging and foundational technologies.[527]

Prior to FIRRMA, a CFIUS review was only applicable when the foreign person was acquiring "control" over a U.S. business. Transaction participants often structured transactions so that the investor was not acquiring "control" to avoid CFIUS review. One strategy was to acquire less than 10% of the voting securities of the U.S. business "solely for the purpose of passive investment," or to provide the foreign investor with certain minority shareholder protections and negative rights that were not sufficient to render such investor in "control" of an U.S. business entity for CFIUS purposes. With the advent of FIRRMA and its expansion of CFIUS purview to certain non-controlling interests, the workarounds described above may no longer be effective for certain transactions, potentially including those in the semiconductor, cybersecurity, telecom and advanced materials industries.

FIRRMA also updated several CFIUS procedures, including for the first time creating a mandatory filing requirement for two types of transactions: (i) transactions in which a foreign person would have a "substantial interest" in a U.S. business that owns or operates critical technology or infrastructure, or has access to certain sensitive personal data of U.S. citizens (a "substantial interest" arises when a foreign person acquires a 25% or greater voting interest, directly or indirectly, in a U.S. business if a foreign government in turn holds 49% or greater voting interest, directly or indirectly, in the foreign person); and (ii) transactions in which a foreign person acquires a noncontrolling or controlling investment in U.S. businesses that manufacture or develop critical technology, including technology that is subject to U.S. government export authorization. In addition, FIRRMA provides for mandatory filers or voluntary filers to use an abbreviated "declaration" containing basic information in lieu of a full-length notice. A declaration must be submitted at least 45 days before closing of the applicable transaction, and within 30 days of filing, CFIUS must decide whether to clear the transaction or request submission of a full-length notice, which would commence a full review period. FIRRMA also lengthened CFIUS's initial review period upon the filing of a full-length notice from 30 days to 45 days. Following the initial review, CFIUS can open an investigation, which must be completed within another 45 days. While FIRRMA did not change the 45-day investigation period, it allowed for investigations to be extended for an additional 15 days in extraordinary circumstances. In practice, this extended timeline is unlikely to have a significant effect on sensitive transactions, as parties to such transactions are often asked to withdraw and re-file their notice, re-starting the applicable review period. Finally, as noted above, FIRRMA gave CFIUS authority to issue interim orders preventing consummation of a transaction pending its review.

In circumstances in which a mandatory filing is not required, it is often still prudent to make a voluntary filing with CFIUS if control of a U.S. business is to be acquired by a non-U.S. acquiror and the likelihood of an investigation is reasonably high or if competing bidders are likely to take advantage of the uncertainty of a potential investigation. If there is significant likelihood of an investigation, it may be advantageous for the parties to forego the opportunity to file a short-form "declaration" and instead move straight to filing a long-form notice, so as to avoid an additional 30-day delay while CFIUS evaluates the "declaration," only to then require a full-length notice

and full investigation. Similar considerations with respect to the use of a "declaration" or the full-length notice will apply for transactions where a mandatory filing is required as a result of the FIRRMA changes. Filings typically should be preceded by discussions with U.S. Treasury officials and other relevant agencies, and companies should consider suggesting methods of mitigation early in the review process in order to help shape any remedial measures and avoid delay or potential disapproval. In some cases, it may even be prudent to make the initial contact prior to the public announcement of the transaction. Such discussions can be instrumental in minimizing the review period. In circumstances where no filing is required and the risk of review is low, but the parties still want assurances that CFIUS and the U.S. President will not take action on their own initiative, the short-form "declaration" can be a useful tool to streamline the CFIUS process and remove lingering uncertainty.

From a transaction-structuring perspective, although practice varies, an increasing number of cross-border transactions in recent years have sought to address CFIUS-related non-consummation risk by including reverse break fees specifically tied to the CFIUS review process. In some of these transactions, particularly in transactions involving Chinese acquirors, U.S. sellers have sought to secure the payment of the reverse break fee by requiring the acquiror to deposit the amount of the reverse break fee into a U.S. escrow account in U.S. dollars, either at signing or in installments over a period of time following signing.

In addition to CFIUS's focus on critical infrastructure, technology and data, foreign investments in U.S. businesses that operate in industries that are deemed critical in the country's response to the COVID-19 pandemic, such as pharma, biotech, medical devices and medical supplies, will likely face additional scrutiny in the future. Likewise, with the pandemic bringing supply chain issues to the fore and exposing the vulnerability of supply chains that depend on sources of production in different countries and continents, companies should expect an increased regulatory focus on preserving domestic supply and a corresponding scrutiny of cross-border acquisitions that would eliminate an independent domestic supplier.

In addition to pandemic-related implications on foreign investment scrutiny and policy, the change in administration following President Biden's election may shift CFIUS's focus and priorities. While the Biden administration is expected to remain supportive of foreign investments in the U.S., particularly from traditional allies, investors should expect that it will maintain a robust CFIUS review process. In particular, investments from countries that are viewed by the U.S. government as strategic competitors or in industries considered to be sensitive to national security will continue to face close scrutiny.

In addition to CFIUS, there are other U.S. regulatory regimes that may be implicated in a cross-border transaction, such as President Trump's May 2019 executive order prohibiting dealings in information and communications technology and services in the U.S. by a "foreign adversary," as designated by the Department of Commerce. While the executive order does not specifically target any country or companies, there is broad

consensus that the order's focus was China and its telecommunications companies, such as Huawei and ZTE. In June 2021, President Biden issued an executive order setting forth a framework for the Department of Commerce review precipitated by President Trump's May 2019 order (while also effecting some changes thereto), also illustrating the new administration's continuation of Trump-era scrutiny on transactions linked to foreign powers, including, in particular, China. In addition, as a result of an April 2020 executive order and subsequent report by the Federal Communications Commission (the "FCC"), as of 2021, applications for international telecommunications or submarine landing licenses by certain entities regulated by the FCC are now subject to review by a new Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector if the applicant has 10% or greater foreign ownership.

Foreign investors should also keep in mind that the U.S. Department of Commerce, Bureau of Economic Analysis requires certain U.S. entities (such as investment funds or their portfolio companies) to file annual "BE 13" survey forms with respect to foreign direct investments in the United States. In particular, a report is required by the U.S. entity with respect to (i) a transaction creating a new "foreign direct investment" in the United States or (ii) a transaction whereby an existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise. Foreign direct investment is defined as "the ownership or control, directly or indirectly, by one foreign person of 10% or more of the voting securities of an incorporated U.S. business enterprise, or an equivalent interest of an unincorporated U.S. business enterprise, including a branch." The completed form must be submitted within 45 days of closing. The failure to report can result in civil or criminal penalties, including fines and imprisonment.

b. Non-U.S. Regimes

For acquisitions of control by U.S. or other acquirors of non-U.S. domiciled companies, similar provisions exist under the laws of other jurisdictions, including most notably in Canada, Australia and China, as well as many European nations. Scrutiny of foreign investment has been increasing over the last several years, with a notable intensification since the beginning of the COVID-19 pandemic. For example, in March 2019, the European Union approved a regulation to help coordinate screening of foreign direct investments in certain "critical" infrastructure, technology, outputs and sensitive information sectors in EU member states, representing the first coordinated mechanism to centralize member states' foreign direct investment reviews. The regulation became effective in October 2020. Some countries that have traditionally been hospitable to offshore investors have focused more attention recently on acquisitions by state-owned or state-connected enterprises. For example, the European Commission recently proposed a new regulation to address distortions caused by government subsidies to foreign companies. The regulation would include, among other things, a mandatory notification and review regime for acquisitions of EU-based companies by foreign investors that have received subsidies or other contributions from non-EU governments. Under the proposed

regulation, a reportable acquisition may not be completed pending the European Commission's review.

Since the onset of the COVID-19 pandemic several European countries—including, notably, the United Kingdom, Germany, France, Italy and Spain—have tightened their foreign investment rules to enable their governments to block acquisitions by foreign buyers of domestic companies. The heightened vigilance in Europe primarily focuses on foreign acquisitions of businesses that operate in strategic sectors, such as critical infrastructure and technology, with a particular focus on healthcare and biotech companies, but governments may also use their new powers to protect domestic companies in other sectors, including in particular national champions, or prevent foreign acquisitions that may impact workers and employment. For example the United Kingdom's National Security and Investment Act, which came into effect on January 4, 2022, will introduce a mandatory notification requirement for acquisitions of U.K. entities in 17 sensitive areas of the economy, including, among others, communications, computing hardware, advanced materials and robotics, AI, data infrastructure, energy, defense, military and dual-use technologies and transport. The act greatly enhances the United Kingdom's ability to review and influence transactions involving foreign investments in U.K.-domiciled companies as a matter of national security, and is just one of many such regimes.

Other countries have taken similar actions, including Canada, where the government responded to the increased risk of opportunistic acquisitions of domestic businesses by announcing that foreign investments in businesses that provide critical goods and services will be subject to enhanced scrutiny, Australia, where the government announced a temporary expansion of the scope of its foreign investment laws by requiring that any investment in an Australian business or asset—regardless of the size of the investment or the sector in which the target operates—obtain approval from the Australian Foreign Investment Review Board, and France, where restrictions on foreign investment rules tightened in September 2021. In addition, China introduced its Measures for Security Review of Foreign Investment, which took effect in January 2021, and provides for national security review similar to that of CFIUS. This global trend is likely to continue as governments seek to protect domestic businesses that have been impacted by the pandemic and increase the resilience of supply chains for critical goods. Increasing nationalistic pressures in many countries may encourage regulators to use their expanded foreign investment review powers for purposes unrelated to national security, such as to protect national champions, or as part of a broader industrial or economic development policy, potentially increasing uncertainty of the outcome of any review of cross-border deals. Given increasing geopolitical tensions, in particular increasing tensions between the U.S. and China, advanced planning for foreign investment scrutiny—which, in some cases, will be a bigger driver of transaction timing than competition reviews—will be critical to timely and successful completion of cross-border deals.

2. Integration Planning and Due Diligence

Integration planning and due diligence also warrant special attention in the cross-border context. Wholesale application of the acquiror's domestic due diligence standards to the target's jurisdiction can cause delay, wasted time and resources, or result in the parties missing key transaction issues.

Due diligence methods must take account of the target jurisdiction's legal regime and local norms, including what steps a publicly traded company can take with respect to disclosing material non-public information to potential bidders and implications for disclosure obligations. Many due diligence requests are best funneled through legal or financial intermediaries as opposed to being made directly to the target company. Due diligence relating to compliance with the sanction regulations overseen by the Treasury Department's Office of Foreign Assets Control is essential for U.S. entities acquiring non-U.S. businesses. Similarly, due diligence with respect to risks related to the Foreign Corrupt Practices Act ("FCPA")—and understanding the DOJ's guidance for minimizing the risk of inheriting FCPA liability—is critical for U.S. buyers acquiring a company with non-U.S. business activities; even acquisitions of foreign companies that do business in the United States may be scrutinized with respect to FCPA compliance. This point is illustrated by the DOJ's 2019 prosecution of Technip FMC PLC, a global oil and gas technology and services provider created by the merger of Technip S.A. and FMC Technologies, Inc., for bribery schemes undertaken by both of its pre-merger predecessors. In 2018, the DOJ established guidance expanding its FCPA Corporate Enforcement Policy to M&A transactions. As a result, when an acquiring company identifies misconduct through pre-transaction due diligence or post-transaction integration, and then self-reports the relevant conduct, the DOJ is now more likely to decline to prosecute if the company fully cooperates, remediates in a complete and timely fashion and disgorges any ill-gotten gains. This presumption of declination was further broadened by the DOJ's 2019 revisions to the policy, which provide that an acquiring company may still be eligible for a declination even if the target it acquired presented aggravating circumstances – for example, if the target's management was complicit in the corruption, the presumption of declination could still apply if the acquiror timely discovered and removed such members of management. This guidance further underscores the importance of careful pre-acquisition due diligence and effective post-closing compliance integration, which will place acquiring companies in the best position to take advantage of the DOJ's enforcement approach in appropriate cases where misconduct is uncovered.

Careful attention must also be paid to foreign operations of domestic companies, including joint ventures with foreign parties. The importance of this issue was dramatically illustrated in the failed attempt in 2013 by Apollo Tyre, an Indian company, to acquire Cooper Tire & Rubber, a U.S.-based company with a significant joint venture in China. During the pendency of the deal, the Chinese minority partner locked Cooper out of the Chinese factory and made demands about a higher price and the potential clash

between Indian and Chinese culture at the plant, which contributed in part to the termination of Cooper's merger agreement with Apollo Tyre.

In the wake of the COVID-19 pandemic, an acquiror's diligence process should give due attention to any pandemic-related relief undertaken or accepted by the target. The types and terms of, and conditions attached to, government-sponsored relief offered to businesses vary significantly across jurisdictions globally, and acquirors should understand any relief taken by a target company as a potential value point in any cross-border negotiation.

Cross-border deals sometimes fail due to poor post-acquisition integration where multiple cultures, languages, historic business methods and distance may create friction. If possible, the executives and consultants who will be responsible for integration should be involved in the early stages of the deal so that they can help formulate and "own" the plans that they will be expected to execute. Too often, a separation between the deal team and the integration/execution teams invites slippage in execution of a plan that in hindsight is labeled by the new team as unrealistic or overly ambitious. However, integration planning needs to be carefully phased-in, as implementation cannot occur prior to the time most regulatory approvals are obtained and merging parties must exercise care not to engage in conduct that antitrust agencies perceive as a premature transfer of beneficial ownership or conspiracy in restraint of trade. Investigations into potential "gun-jumping" present costly and delaying distractions during substantive merger review.

3. Competition Review and Action

Cross-border M&A activity is subject to review by competition authorities, and parties should carefully prepare for multi-jurisdictional review and notifications. More than 100 jurisdictions have pre-merger notification regimes, and the list continues to grow; multinational transactions (including minority investments) may require over a dozen notifications.

Competition authorities (particularly those in the United States, Europe, the United Kingdom and Canada) often, though not always, coordinate their investigations of significant transactions. To the extent that a non-U.S. acquiror directly or indirectly competes or holds an interest in a company that competes in the same industry as the target company, antitrust concerns may arise either at the federal agency- or state attorneys general-level in the United States, as well as in the home country. Increasingly, concerns can also arise if the foreign acquiror of a U.S. target participates in a market either upstream or downstream of the target, as was the case, for example, in Bayer's 2018 acquisition of Monsanto. Competition analyses will need to consider variations in market conditions and competition law across relevant jurisdictions. How conglomerate relationships are treated (and views as to required relief) is one area of meaningful variation among competition authorities.

Like the U.S., the EU also has a pre-merger notification regime. Transactions involving companies with operations across multiple EU member states must be submitted to the European Commission for approval, while mergers involving smaller companies, or companies with a more limited geographic footprint, may not be reportable at the EU level and may instead trigger antitrust reviews in multiple EU countries. Additionally, under recent guidance issued by the European Commission, EU member states may refer to the European Commission transactions that do not trigger antitrust review either at the EU or at the member state level. This was the case, for example, in the recent acquisition of Grail by Illumina, a transaction that did not trigger any antitrust approval in Europe but was nonetheless referred to the European Commission by the antitrust regulators of France and other EU member states.

The EU review process typically involves extensive pre-notification discussions between the European Commission and the parties, which can significantly delay the submission of the formal notification. Even after submission of the formal filing, the timing of the review can be unpredictable, as regulators have the ability to stop the clock in connection with requests for additional information. In recent years, the European Commission has become increasingly strict in its M&A antitrust enforcement, often requiring extensive remedial actions to address both horizontal and vertical concerns.

Prior to Brexit and until the end of 2020, all EU-reportable deals were exempt from the jurisdiction of the CMA. As a result, for decades the CMA did not review large global transactions because the European Commission's review typically took jurisdiction away from the CMA. That changed in January 2021, when the CMA obtained jurisdiction to review and challenge deals that are also subject to review in the EU. This adds an additional hurdle and potential delay for transactions involving parties with operations both in the United Kingdom and the EU, in addition to the risk of inconsistent outcomes. For example, S&P Global's proposed acquisition of IHS Markit was subject to extensive parallel reviews by both the European Commission and the CMA, which ultimately reached partially divergent conclusions and, with one exception, required different remedies. In recent years, the CMA has been particularly active with respect to mergers involving big tech companies and nascent competitors. The recent decision to order the unwinding of Meta's consummated acquisition of Giphy is just the latest example of this trend. The deal, announced in May 2020, was not originally notified to the CMA, but the agency asserted jurisdiction to review the deal despite Giphy's very small presence in the United Kingdom. Following completion of the deal, the CMA opened an investigation and issued an interim enforcement order preventing the parties from integrating their operations. Despite the lack of direct competition between the parties, the CMA found that the acquisition would raise competition concerns in the supply of display advertising in the United Kingdom, and in the supply of social media services worldwide, and required Meta to divest Giphy. Meta recently appealed the decision.

China also has a robust pre-merger notification system and has been active in its review and enforcement activities. In 2018, MOFCOM was succeeded by and is now

known as the State Administration for Market Regulation ("SAMR"). SAMR has granted conditional approval subject to the fulfillment of certain conditions in several major cross-border transactions, including Bayer's acquisition of Monsanto (conditioned on the divestiture of certain parts of Bayer's business and commitments with respect to digital agricultural products and services in China), Dow Chemical's 2017 merger with DuPont (conditioned on the divestiture of certain parts of each party's business, supply and distribution commitments in China) and AB InBev's 2016 acquisition of SABMiller (conditioned on the divestiture of SABMiller's 49% equity stake in a Chinese joint venture).

China's antitrust laws require that SAMR review any acquisition where aggregate global sales of all parties exceed Rmb10 billion and sales in China for each of at least two parties exceed Rmb400 million. This low threshold for Chinese sales puts many U.S. or European deals squarely within SAMR's jurisdiction. China's laws also give SAMR broad latitude in selecting remedies and the timing of review. The review clock in China only starts ticking after SAMR accepts the filing, which can take weeks or months at SAMR's discretion. The review process itself can take longer than most jurisdictions and be unpredictable – while under the statute SAMR has 90 days after its initial acceptance of the filing to complete its review, which can be extended for a further 60 days, the review typically takes much longer, with the parties often withdrawing and resubmitting the notification to give SAMR more time to complete its review. For example, FedEx's acquisition of TNT Express received clearance from U.S., EU and Brazilian regulatory authorities by early February 2016, but did not receive clearance from SAMR until the end of April 2016, and Qualcomm's $44 billion acquisition of NXP received clearance from antitrust regulators in eight jurisdictions, including the U.S., EU, Taiwan and Korea, by January 2018, but in the midst of intensifying trade tensions between the United States and China, never obtained SAMR clearance and was therefore terminated in July 2018. However, certain transactions with limited horizontal or vertical market overlap, or where the acquisition target (or joint venture, as applicable) does not engage in economic activities in China, may be eligible for SAMR's simplified merger review procedure. This typically reduces the formal review period after SAMR's initial acceptance of the filing to approximately 30 calendar days on average.

Additionally, India's merger control regime, which came into force in 2011 with the creation of the Competition Commission of India ("CCI"), is now in full swing. An extensive amount of information about the parties and the transaction is required to be included in the notification, and India is one of very few jurisdictions that requires notification to be filed within 30 days of either the board(s) of directors' approval of the combination or the execution of any binding documents related to the combination. The CCI has 30 to 210 days from the date of filing to issue a decision, but the clock stops whenever the CCI issues a request for supplemental information. Parties should expect at least one or two supplemental requests for information to stop the clock. Consequently, the review period will generally be at least two to three months and depending upon the complexity of the matter can be longer.

Since the first quarter of 2020, antitrust and competition authorities around the world have responded to the COVID-19 pandemic, primarily by moving to remote work and adopting temporary arrangements to ensure that they can continue to carry out their enforcement mandates despite the difficult circumstances caused by the pandemic. While some jurisdictions initially took emergency actions in response to the pandemic, including encouraging or requiring merging parties to delay formal notifications or suspending statutory deadlines, most antitrust and competition authorities have since resumed normal operations even if their staff continue to work mostly remotely.

4. Deal Techniques and Cross-Border Practice

Understanding the custom and practice of M&A in the target's local jurisdiction is essential. Successful execution is more art than science, and will benefit from early involvement by experienced local advisors. For example, understanding when to respect—and when to challenge—a target's sale "process" may be critical. Knowing how and at what price level to enter the discussions will often determine the success or failure of a proposal. In some situations, it is prudent to start with an offer on the low side, while in other situations, offering a full price at the outset may be essential to achieving a negotiated deal and discouraging competitors, including those who might raise political or regulatory issues. In strategically or politically sensitive transactions, hostile maneuvers may be imprudent; in other cases, unsolicited pressure may be the only way to force a transaction. Similarly, understanding in advance the roles of arbitrageurs, hedge funds, institutional investors, private equity funds, proxy voting advisors and other important market players in the target's market—and their likely views of the anticipated acquisition attempt as well as when they appear and disappear from the scene—can be pivotal to the outcome of the contemplated transaction.

Where the target is a U.S. public company, the customs and formalities surrounding board of director participation in the M&A process, including the participation of legal and financial advisors, the provision of customary fairness opinions, and the inquiry and analysis surrounding the activities of the board and the financial advisors, can be unfamiliar and potentially confusing to non-U.S. transaction participants and can lead to misunderstandings that threaten to upset delicate transaction negotiations. Non-U.S. participants need to be well-advised as to the role of U.S. public company boards and the legal, regulatory and litigation framework and risks that can constrain or prescribe board action. In particular, the litigation framework should be kept in mind as shareholder litigation often accompanies M&A transactions involving U.S. public companies. The acquiror, its directors, shareholders and offshore reporters and regulators should be conditioned in advance (to the extent possible) to expect litigation and not to necessarily view it as a sign of trouble. In addition, it is important to understand that the U.S. discovery process in litigation is different, and in some contexts more intrusive, than the process in other jurisdictions. Moreover, the choice of governing law and the choice of forum to govern any potential dispute between the parties about the terms or enforceability of the agreement may have a substantial effect on the outcome of any such dispute, or even be outcome determinative. Parties entering into cross-border

transactions should consider with care whether to specify the remedies available for breach of the transaction documents and the mechanisms for obtaining or resisting such remedies.

The litigation risk and the other factors mentioned above can impact both tactics and timing of M&A processes and the nature of communications with the target company. Additionally, local takeover regulations often differ from those in the acquiror's home jurisdiction. For example, the mandatory offer concept common in Europe, India and other countries—in which an acquisition of a certain percentage of securities requires the bidder to make an offer for either the balance of the outstanding shares or for an additional percentage—is very different from U.S. practice, as is a regulator-supervised auction of the type the U.K. Takeover Panel imposed as Comcast and 21st Century Fox competed to acquire Sky PLC. Permissible deal-protection structures, pricing requirements and defensive measures available to targets also differ. Sensitivity also must be given to the contours of the target board's fiduciary duties and decision-making obligations in home jurisdictions, particularly with respect to consideration of stakeholder interests other than those of shareholders and nonfinancial criteria.

In addition to these customs and formalities, participants in a cross-border transaction should focus attention on the practical considerations of dealing with a counterparty that is subject to a foreign legal regime. For example, acknowledging the potential practical constraints around enforcing a remedy in a foreign jurisdiction can significantly change negotiating dynamics and result in alternative deal structures. Escrow deposit structures or letters of credit from U.S. banks have been used a number of times to reduce enforceability risk in transactions with Chinese acquirors and may be instructive in other contexts where enforceability is not assured.

The multifaceted overlay of foreign takeover laws and the legal and tactical considerations they present can be particularly complex when a bid for a non-U.S. company may be unwelcome. Careful planning and coordination with foreign counsel are critical in hostile and unsolicited transactions, on both the bidder and target sides. For example, Italy's "passivity" rule that limits defensive measures a target can take without shareholder approval is suspended unless the hostile bidder is itself subject to equivalent rules. A French company's organizational documents can provide for a similar rule, and France's Florange Act has made it the default that a French company's long-term shareholders are granted double voting rights, which reduces the influence of toehold acquisitions or merger arbitrageurs. Dutch law and practice allow for the target's use of an independent "foundation," or *stichting*, to at least temporarily defend against hostile offers through the issuance of voting shares. The foundation, which is controlled by independent directors appointed by the target and has a broad defensive mandate, is issued high-vote preferred shares at a nominal cost, which allow it to control the voting outcome of any matter put to target shareholders. The three-way battle among Mylan, Perrigo and Teva in 2015 illustrated such a takeover defense. Mylan (which had inverted from Pennsylvania to the Netherlands) used a potent combination of takeover defenses

facilitated by Dutch law, including the use of a *stichting* which was issued up to 50% of Mylan's voting shares, and Mylan's own governance documents, to take a resist-at-all-costs approach to Teva's bid, even as it pursued its own hostile offer against Perrigo, which had no similar defenses as an Irish-domiciled company.

Disclosure obligations may also vary across jurisdictions. How and when an acquiror's interest in the target is publicly disclosed should be carefully controlled to the extent possible, keeping in mind the various ownership thresholds or other triggers for mandatory disclosure under the law of the jurisdiction of the company being acquired. Treatment of derivative securities and other pecuniary interests in a target other than equity holdings also vary by jurisdiction and have received heightened regulatory focus in recent periods. For example, in 2021, a panel of the Alberta Securities Commission in Canada found that a hostile bidder's use of cash-settled total return swaps—which gave the bidder economic exposure to (and control of) underlying target shares—and lack of disclosure in respect thereof was abusive to the target company's shareholders and ordered that the minimum tender condition be increased to take account of the shares that were controlled by the bidder through the cash-settled swaps.

5. Acquisition Financing and Restructuring in Cross-Border Transactions

When devising a financing strategy, potential acquirors in cross-border transactions with access to multiple debt markets (*e.g.*, U.S., Euro, and U.K. markets) should consider whether accessing one or multiple of such markets will result in best pricing and execution. Acquirors must also consider whether the law of the target's jurisdiction requires certain specific conditionality provisions (*e.g.*, the "funds certain" requirement in certain European jurisdictions). Similarly, potential acquirors, particularly leveraged acquirors, may want to explore alternative, non-traditional financing sources and structures, including seller paper or, increasingly, direct lenders. Under U.S. law, unlike the laws of some other jurisdictions, non-U.S. acquirors are not prohibited from borrowing from U.S. lenders, and they generally may use the assets of U.S. targets as collateral (although there are some important limitations on using stock of U.S. targets as collateral).

6. U.S. Cross-Border Securities Regulation

United States securities regulations apply to acquisitions and other business combinations involving non-U.S. companies with U.S. security holders unless bidders can avoid a jurisdictional nexus with the United States and exclude U.S. security holders. Where a transaction cannot escape U.S. securities regulations in this manner, exemptive relief may be available. Under the current two-tiered exemptive regime, relief from certain U.S. regulatory obligations is available for tender offers that qualify for one of two exemptions—the "Tier I" exemption, where U.S. security holders hold less than 10% of a security subject to a tender offer, and the "Tier II" exemption, where U.S. security holders hold less than 40% of a security subject to the tender offer. Tier I transactions are exempt from almost all of the disclosure, filing and procedural requirements of the U.S.

federal tender offer rules, and securities issued in Tier I exchange offers, business combination transactions and rights offerings need not be registered under the Securities Act. Tier II provides narrow relief from specified U.S. tender offer rules that often conflict with non-U.S. law and market practice (such as with respect to prompt payment, withdrawal rights, subsequent offering periods, extension of offers, notice of extension and certain equal treatment requirements) but does not exempt the transaction from most of the procedural, disclosure, filing and registration obligations applicable to U.S. transactions or from the registration obligations of the Securities Act. Non-U.S. transactions where U.S. ownership in the target company exceeds 40% are subject to U.S. regulation as if the transaction were entirely domestic. In the absence of Tier I or Tier II relief, the SEC will consider granting no-action relief with respect to certain matters when the federal securities laws conflict with the securities laws of a foreign jurisdiction.

Several of the revisions to the U.S. cross-border securities regulatory regime enacted in 2008 have provided U.S. and non-U.S. bidders with somewhat enhanced flexibility and certainty in structuring deals for non-U.S. targets, even if the amendments did not fundamentally alter the nature or scope of the existing regulations, nor, in some respects, go far enough in enacting reforms.[528] The 2008 revisions also codified relief in several areas of frequent conflict and inconsistency between U.S. and non-U.S. regulations and market practice.

Significantly, neither Tier I nor Tier II exemptive relief limits the potential exposure of non-U.S. issuers—in nearly all cases already subject to regulation in their home jurisdiction—to liability under the antifraud, anti-manipulation and civil liability provisions of the U.S. federal securities laws in connection with transactions with U.S. entanglements. Both this risk and a desire to avoid the demands of U.S. regulation have persuaded many international issuers and bidders to avoid U.S. markets and exclude U.S. investors from significant corporate transactions. Notably, the exclusionary techniques that have developed for avoiding applicability of U.S. securities regulation are often simply not available to non-U.S. purchasers who buy shares through, for example, open market purchases. It may be impossible when transacting on non-U.S. exchanges to exclude U.S. sellers, and, hence, this inability to exclude U.S. sellers may render problematic any attempts to structure around U.S. laws. As was seen in the Endesa/E.ON/Acciona matter in which E.ON, a German bidder for Endesa, a Spanish utility, sued Acconia, a Spanish corporation that had acquired shares of Endesa to become a "key" stockholder under Spanish law, in the Southern District of New York, such uncertainty—and the potential for ensuing litigation—can be exploited to gain tactical advantage in a takeover battle.

C. Deal Consideration and Transaction Structures

While cash remains the predominant form of consideration in cross-border deals, non-cash structures are not uncommon, offering target shareholders the opportunity to participate in the resulting global enterprise. Where target shareholders will obtain a continuing interest in the acquiring corporation, expect heightened focus on the corporate governance and other ownership and structural arrangements of the acquiror in addition

to business prospects. Pricing structures must be sensitive to exchange rate and currency risk as well as volatility in international markets. Alternatives to all-cash structures include non-cash currencies, such as depositary receipts, "global shares" and straight common equity, as well as preferred securities and structured debt.

Transaction structure may affect the ability to achieve synergies, influence actual or perceived deal certainty and influence market perception. Structures should facilitate, rather than hinder, efforts to combine the operations of the two companies so as to achieve greater synergies, promote unified management and realize economies of scale. The importance of simplicity in a deal structure should not be underestimated—simple deal structures are more easily understood by market players and can facilitate the ultimate success of a transaction.

One of the core challenges of cross-border deals using acquiror stock is the potential "flowback" of liquidity in the acquiror's stock to the acquiror's home market. This exodus of shares, prompted by factors ranging from shareholder taxation (*e.g.*, withholding taxes or loss of imputation credits), index inclusion of the issuer or target equity, available liquidity in the newly issued shares and shareholder discomfort with non-local securities, to legal or contractual requirements that certain institutional investors not hold shares issued by a non-local entity or listed on a non-local exchange, can put pressure on the acquiror's stock price. It may also threaten exemptions from registration requirements that apply to offerings outside the home country of the acquiror.

United States and foreign tax issues will, of course, also influence deal structure. In structuring a cross-border deal, the parties will attempt to maximize tax efficiency from a transactional and ongoing perspective, both at the entity and at the shareholder level. In transactions involving a significant equity component, careful consideration may need to be given to whether the combined group should be U.S. or foreign parented. Although U.S. tax legislation enacted in 2017 has adopted certain features of a "territorial" tax regime, it will be critical to carefully analyze and quantify the costs of subjecting the combined group to U.S. tax rules by virtue of being U.S. parented, particularly the application of the U.S. "controlled foreign corporation" rules, which were significantly expanded by the "GILTI" regime, to non-U.S. subsidiaries. Importantly, the 2017 legislation did not change the U.S. tax rules generally applicable to mergers and acquisitions and also left in place rules applicable to "inversion" transactions. In fact, the law contains harsh additional rules intended to deter inversions. Rather than simplifying corporate taxation, U.S. tax "reform" thus has further exacerbated the complexity of U.S. tax rules applicable to multinational groups.

Transactions involving an exchange of shares in a U.S. target corporation for shares of a foreign corporation generally will be tax free to the U.S. target shareholders only if, in addition to satisfying the generally applicable rules regarding reorganizations or Section 351 exchanges, they satisfy additional requirements under Section 367(a) of the Internal Revenue Code and related Treasury Regulations (which require, among other things, that the equity value of the foreign merger party be at least equal to the equity value of the domestic merger party (as determined under complex computational rules)).

Further, cross-border transactions in which shareholders of the U.S. merger party receive equity in a foreign parent need to be analyzed under Section 7874 of the Internal Revenue Code and related rules applicable to "inversions."

1. All-Cash

All-cash transactions are easy for all constituencies to understand and do not present flowback concerns. The cash used in the transaction frequently must be financed through equity or debt issuances that will require careful coordination with the M&A transaction. Where cash constitutes all or part of the acquisition currency, appropriate currency hedging should be considered, given the time necessary to complete a cross-border transaction. Careful planning and consideration should be given to any hedging requirements, which can be expensive and, if they need to be implemented before the announcement of a deal, may create a leak. In addition, parties should be cognizant of financial assistance rules in certain non-U.S. jurisdictions that may limit the ability to use debt financing for an acquisition, as well as tax rules limiting the deductibility of interest expense.

2. Equity Consideration

United States securities and corporate governance rules can be problematic for non-U.S. acquirors who will be issuing securities that will become publicly traded in the U.S. as a result of an acquisition. SEC rules, the Sarbanes-Oxley and Dodd-Frank Acts and stock exchange requirements should be evaluated to ensure compatibility with home country rules and to be certain that the non-U.S. acquiror will be able to comply. Rules relating to director independence, internal control reports, and loans to officers and directors, among others, can frequently raise issues for non-U.S. companies listing in the United States. Structures involving the issuance of non-voting stock or other special securities of a non-U.S. acquiror may serve to mitigate some of the issues raised by U.S. corporate governance concerns. Similar considerations must be addressed for U.S. acquirors seeking to acquire non-U.S. targets. Governance practices can also be relevant when equity consideration is used in a hostile acquisition. For example, in Mylan's hostile cash and stock offer for Perrigo, Mylan's shareholder-unfriendly governance regime, which was permissible in the Netherlands, was a sticking point for many Perrigo investors, and was a significant driver in Mylan's inability to generate sufficient support for its offer among Perrigo shareholders. Similarly, increased investor and regulatory focus on ESG disclosures and reporting requirements across the EU and the United Kingdom may also affect non-U.S. investors' support of a hostile acquiror less focused on or transparent about such matters.

3. Stock and Depositary Receipts

All-stock transactions provide a straightforward structure for a cross-border transaction but may be susceptible to flowback, as some institutional investors prefer not to, or are not permitted to, hold foreign securities. A depositary receipt approach may mitigate flowback, as local institutional investors may be willing to hold the depositary

receipts instead of the underlying non-local shares, easing the rate at which shares are sold back into the acquiror's home country market. In the typical depositary receipt program, the depositary receipt holders are free to surrender their receipts to the depositary in exchange for the underlying shares. Once the underlying shares are received, the non-U.S. shareholder is free to trade them back into the acquiror's home market.

4. "Dual Pillar" Structures

A more complex and rarely deployed structure for a cross-border combination is known as the dual-listed company ("DLC") structure. In a DLC structure, each of the publicly traded parent corporations retains its separate corporate existence and stock exchange listing. Management integration typically is achieved through overlapping boards of directors. Unilever was an example of a DLC structure, with two separately listed British and Dutch operating companies. However, Unilever announced in June 2020 that it would seek shareholder approval to consolidate its DLC structure into a single company based in the United Kingdom, despite a failed attempt to move to a single listing structure based in Rotterdam in 2018 that faced criticism from key British shareholders. Unilever's shareholders approved the unification in October 2020, with the support of over 99% of shares voted. Similarly, in November 2021, Royal Dutch Shell, which had been dual-listed in the Netherlands and the United Kingdom since 2005, announced that it would seek shareholder approval to abandon its DLC structure and move to a single listing structure based in the United Kingdom, explaining that the move would, among other things, streamline the company's transition to cleaner and more sustainable low-carbon energy, as well as accelerate shareholder distributions, simplify the capital structure and make it easier for shareholders to value the company. Because DLC structures raise novel and complex tax, accounting, governance and other issues as applied to the U.S., these structures have not been employed in cross-border combinations involving a U.S. parent corporation.

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13 *Id.* at *7-8.

14 Martin Lipton, *International Business Council of the World Economic Forum*, The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership

between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth (2016), *available at* https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf.

[15] *See Paramount Commc'ns, Inc.* v. *Time Inc. (Time-Warner)*, 571 A.2d 1140, 1142, 1150, 1151 (Del. 1990).

[16] *RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816, 865 n.191 (Del. 2015).

[17] DEL. CODE ANN. tit. 8, § 141(e) (West 2015).

[18] *Smith* v. *Van Gorkom (Trans Union)*, 488 A.2d 858, 874 (Del. 1985) (holding that in the context of a proposed merger, directors must inform themselves of all "information . . . reasonably available to [them] and relevant to their decision" to recommend the merger); *see also Aronson* v. *Lewis*, 473 A.2d 805, 812 (Del. 1984) ("[U]nder the business judgment rule director liability is predicated upon concepts of gross negligence.").

[19] Under Del. Code Ann. tit. 8, section 102(b)(7), a Delaware corporation may in its certificate of incorporation either limit or eliminate entirely the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty, but such provisions may not eliminate or limit the liability of a director for, among other things, (1) breach of the director's duty of loyalty to the corporation or its shareholders or (2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law. Many Delaware corporations have either eliminated or limited director liability to the extent permitted by law. The Delaware Supreme Court has ruled that the typical Delaware corporation charter provision exculpating directors from monetary damages in certain cases applies to claims relating to disclosure issues in general and protects directors from monetary liability for good faith omissions. *See Arnold* v. *Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994). Similar provisions have been adopted in most states. The limitation on personal liability does not affect the availability of injunctive relief.

[20] *See, e.g.*, *Ivanhoe Partners* v. *Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987); *In re PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006) (reviewing under the entire fairness standard a transaction in which most public shareholders were cashed out but some shareholders, including the directors, continued as shareholders of the recapitalized company); *Blasius Indus., Inc.* v. *Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) (holding that actions by the board after a consent solicitation had begun that were designed to thwart the dissident shareholder's goal of obtaining majority representation on the board, violated the board's fiduciary duty); *AC Acquisitions Corp.* v. *Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) ("[W]here a self-interested corporate fiduciary has set the terms of a transaction and

caused its effectuation, it will be required to establish the entire fairness of the transaction to a reviewing court's satisfaction.").

[21] *See Guth* v. *Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *see also Broz* v. *Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996) (stating that a director "may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the [director] will thereby be placed in a position inimicable to his duties to the corporation" but that a director "*may* take a corporate opportunity if: (1) the opportunity is presented to the director . . . in his individual and not his corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity").

[22] *Stone ex rel. AmSouth Bancorporation* v. *Ritter*, 911 A.2d 362, 370 (Del. 2006).

[23] *Id.*

[24] *In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 67 (Del. 2006).

[25] *See Amirsaleh* v. *Bd. of Trade of City of New York, Inc.*, C.A. No. 2822-CC, 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009); *Liberty Prop. L.P.* v. *25 Mass. Ave. Prop. LLC*, C.A. No. 3027-VCS, 2009 WL 224904, at *5 & n.21 (Del. Ch. Jan. 22, 2009), *aff'd sub nom. 25 Mass. Ave. Prop. LLC* v. *Liberty Prop. Ltd. P'ship*, 970 A.2d 258 (Del. 2009).

[26] *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 244 (Del. 2009).

[27] *In re Cornerstone Therapeutics Inc. Stockholder Litig.*, 115 A.3d 1173 (Del. 2015).

[28] J. Travis Laster, *Revlon Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 26-27 (2013) (discussing the distinction between standards of conduct and standards of review).

[29] *In re Goldman Sachs Grp., Inc. S'holder Litig.*, C.A. No. 5215-VCG, 2011 WL 4826104, at *23 (Del. Ch. Oct. 12, 2011) (quoting *In re Citigroup Inc. S'holder Derivative Litig*., 964 A.2d 106, 139 (Del. Ch. 2009)).

[30] DEL. CODE ANN. tit. 8, § 141(a) (West 2011).

[31] *See, e.g.*, *Aronson* v. *Lewis*, 473 A.2d 805, 812-13 & n.6 (Del. 1984).

[32] *Unitrin, Inc.* v. *Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (quoting *Unocal Corp.* v. *Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)).

[33] *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 615 (Del. Ch. 2005).

[34] *E.g.*, *Orman* v. *Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002).

[35] *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[36] *Unocal*, 493 A.2d 946.

[37] *Reis* v. *Hazelett Strip-Casting Corp*., 28 A.3d 442, 457 (Del. Ch. 2011).

[38] *RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816, 857 (Del. 2015).

[39] *Corwin* v. *KKR Fin. Holdings, LLC*, 125 A.3d 304, 312 (Del. 2015).

[40] *See, e.g.*, *id.* at 308-14; *but cf. id.* at 311 n.20 (declining to rule on the continued vitality of *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 68 (Del. 1995), in which the court did not apply the business judgment rule to the Santa Fe board's decision to adopt defensive measures to ward off a hostile approach from Union Pacific, on the ground that "the stockholders of Santa Fe merely voted in favor of the merger [with Burlington] and not the defensive measures").

[41] On a motion for preliminary injunction, Vice Chancellor Parsons "conclude[d] that Plaintiffs are likely to succeed on their argument that the approximately 50% cash and 50% stock consideration here triggers *Revlon*." *In re Smurfit-Stone Container Corp. S'holder Litig.*, C.A. No. 6164-VCP, 2011 WL 2028076, at *16 (Del. Ch. May 24, 2011).

[42] *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

[43] *Barkan* v. *Amsted Indus., Inc*., 567 A.2d 1279, 1286 (Del. 1989).

[44] *Paramount Commc'ns Inc.* v. *QVC Network Inc. (QVC)*, 637 A.2d 34, 45 (Del. 1994).

[45] *C & J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1053 (Del. 2014).

[46] *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 242 (Del. 2009).

[47] *Id.*

[48] *See Gantler* v. *Stephens*, 965 A.2d 695 (Del. 2009) (*Unocal* review not required where the plaintiff challenged the board's decision to reject the offers of three suitors and pursue a recapitalization instead); *TW Servs., Inc.* v. *SWT Acquisition Corp.*, C.A. Nos. 10427, 10298, 1989 WL 20290 (Del. Ch. Mar. 2, 1989) (*Revlon* not triggered by an unsolicited offer to negotiate a friendly deal).

[49] *Paramount Commc'ns, Inc.* v. *Time Inc. (Time-Warner)*, 571 A.2d 1140 (Del. 1990).

[50] *QVC*, 637 A.2d 34.

[51] Tr. of Ruling of the Ct. on Pls.' Mot. For a Prelim. Inj. at 6-7, *Steinhardt* v. *Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. Jan. 24, 2011) ("[I]t's just not worth having the dance on the head of a pin as to whether it's 49 percent cash or 51 percent cash or where the line is. This is the only chance that Occam stockholders have to extract a premium, both in the sense of maximizing cash now, and in the sense of maximizing their relative share of the future entity's control premium. This is it. So I think it makes complete sense that you would apply a reasonableness review, enhanced scrutiny to this type of transaction.").

[52] *See Time-Warner*, 571 A.2d at 1154; *accord In re Santa Fe Pac. Corp. S'holder Litig.*, C.A. No. 13587, 1995 WL 334258, at *8 (Del. Ch. May 31, 1995) (holding that although a "bidding contest" did occur, *Revlon* duties not triggered where board did not initiate bidding and sought strategic stock-for-stock merger), *aff'd in part*, *rev'd in part*, 669 A.2d 59 (Del. 1995).

[53] *Time-Warner*, 571 A.2d at 1150; *see also id.* at 1154 ("The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals."); *accord Arnold* v. *Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289-90 (Del. 1994).

[54] Transactions in which a controller cashes or squeezes out the minority are often subject to entire fairness review, discussed *infra* Section II.C.

[55] *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1047-48 (Del. Ch. 2012); *In re NCS Healthcare, Inc., S'holders Litig.*, 825 A.2d 240, 254-55 (Del. Ch. 2002) ("The situation presented on this motion does not involve a change-of-control. On the contrary, this case can be seen as the obverse of a typical *Revlon* case. Before the transaction . . . is completed, [the seller] remains controlled by the [controlling stockholder]. The record shows that, as a result of the proposed [] merger, [the seller's] stockholders will become stockholders in a company that has no controlling stockholder or group. Instead, they will be stockholders in a company subject to an open and fluid market for control."), *rev'd on other grounds sub nom. Omni Care, Inc.* v. *NCS Healthcare, Inc.*, 822 A.2d 397 (Del. 2002).

[56] *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr.* v. *Presidio, Inc.*, 251 A.3d 212, 266 (Del. Ch. 2021).

[57] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995).

[58] *In re Smurfit-Stone Container Corp. S'holder Litig.*, C.A. No. 6164-VCP, 2011 WL 2028076, at *15 (Del. Ch. May 24, 2011).

[59] *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 241 (Del. 2009).

[60] *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 89-96 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816 (Del. 2015).

[61] *Paramount Commc'ns Inc.* v. *QVC Network Inc. (QVC)*, 637 A.2d 34, 44 (Del. 1994).

[62] *Golden Cycle, LLC* v. *Allan*, C.A. No. 16301, 1998 WL 892631, at *16 (Del. Ch. Dec. 10, 1998); *accord In re MONY Grp. Inc. S'holder Litig*., 852 A.2d 9, 15 (Del. Ch. 2004).

[63] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573 (Del. Ch. 2010).

[64] *Id.* at 578.

[65] *Id.* at 595-96.

[66] *In re Family Dollar Stores, Inc. Stockholder Litig.*, C.A. No. 9985-CB, 2014 WL 7246436 (Del. Ch. Dec. 19, 2014).

[67] *Id.* at *16.

[68] *C&J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1053 (Del. 2014).

[69] *Mills Acquisition Co.* v. *Macmillan, Inc.*, 559 A.2d 1261, 1286 (Del. 1989); *Barkan* v. *Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).

[70] *Macmillan*, 559 A.2d at 1287.

[71] *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005).

[72] *In re Smurfit-Stone Container Corp. S'holder Litig.*, C.A. No. 6164-VCP, 2011 WL 2028076, at *17, *18, *22 (Del. Ch. May 24, 2011).

[73] *In re Plains Expl. & Prod. Co. Stockholder Litig*., C.A. No. 8090-VCN, 2013 WL 1909124, at *5 (Del. Ch. May 9, 2013) (internal quotation marks omitted).

[74] *C&J Energy Servs.*, 107 A.3d at 1067-68.

[75] *In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del. Ch. 2007) (entering injunction requiring waiver of standstill agreement with potential bidder during go-shop period to allow potential bidder to make an offer).

[76] *See, e.g.*, *In re Cogent, Inc. S'holders Litig.*, 7 A.3d 487, 497-98 (Del. Ch. 2010).

[77] *In re Netsmart Techs., Inc. S'holders Litig*., 924 A.2d 171 (Del. Ch. 2007); *see also* Tr. of Oral Arg. on Pls.' Mot. for Prelim. Inj. at 14, 20, *Forgo* v. *Health Grades, Inc.*, C.A. No. 5716-VCS, 2010 WL 9036904 (Del. Ch. Sept. 3, 2010) (criticizing the target's board for failing to "sift through possible . . . buyers and make a judgment about whether there might be someone who would be interested" and create "any record that it really segmented the market or considered whether there was a likely buyer").

[78] *Netsmart*, 924 A.2d at 198-99.

[79] *Id.* at 209.

[80] *Koehler* v. *NetSpend Holdings Inc.*, C.A. No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013).

[81] *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 243 (Del. 2009).

[82] *RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816 (Del. 2015).

[83] *Id.* at 830-31.

[84] *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 94 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts.*, 129 A.3d 816.

[85] *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 224 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts.*, 129 A.3d 816.

[86] *RBC Capital Mkts.*, 129 A.3d at 860; *see also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011) (finding implied *Revlon* violation due to board's failure to oversee conduct of financial advisors).

[87] *In re PLX Tech. Inc. Stockholders Litig*, C.A. No. 9880-VCL, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137, 2019 WL 2144476 (Del. 2019).

[88] *Id.* at *47.

[89] *Id.* at *45-47.

[90] *Id.* at *47.

[91] *In re Mindbody, Inc.*, 2020 WL 5870084, at *25 (Del. Ch. Oct. 2, 2020).

[92] *Id.* n.229.

[93] *See, e.g.*, *Paramount Commc'ns Inc.* v. *QVC Network Inc. (QVC)*, 637 A.2d 34, 45 (Del. 1994); *Barkan* v. *Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989). Two subsequent Delaware Supreme Court decisions confirm that board actions subject to review under *Unocal* in the context of an active takeover defense will in other circumstances need to satisfy only the standard business judgment analysis. In *Williams* v. *Geier*, 671 A.2d 1368 (Del. 1996), the Delaware Supreme Court reiterated that adoption of a defensive measure approved by shareholder vote would not be subjected to *Unocal* scrutiny since it would not constitute unilateral board action. In *Kahn ex rel. DeKalb Genetics Corp.* v. *Roberts*, 679 A.2d 460 (Del. 1996), the Delaware Supreme Court refused to apply *Unocal*'s enhanced scrutiny to a share repurchase program, because that program was not initiated in response to any perceived threat.

[94] *Unitrin, Inc.* v. *Am. Gen. Corp.*, 651 A.2d 1361, 1373, 1388 (Del. 1995).

[95] The Delaware Court of Chancery's decision in *Santa Fe*, which concluded that the adoption of a "discriminatory" rights plan to defend against a third-party unsolicited, all-cash all-shares offer was a reasonable measure under *Unocal*, again recognizes the board's discretion in preserving a strategic plan. *In re Santa Fe Pac. Corp. S'holder Litig.*, C.A. No. 13587, 1995 WL 334258, at *9-10 (Del. Ch. May 31, 1995), *aff'd in part, rev'd in part*, 669 A.2d 59, 71-72 (Del. 1995).

[96] *Chesapeake Corp.* v. *Shore*, 771 A.2d 293, 344 (Del. Ch. 2000).

[97] *Air Prods. & Chems., Inc.* v. *Airgas, Inc.*, 16 A.3d 48, 129 (Del. Ch. 2011).

[98] *Id.*

[99] *ACE Ltd.* v. *Capital Re Corp.*, 747 A.2d 95, 108 (Del. Ch. 1999); *see also Phelps Dodge Corp.* v. *Cyprus Amax Minerals Co.*, C.A. Nos. 17398, 17383, 17427, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999); *La. Mun. Police Emps.' Ret. Sys.* v. *Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007) ("Nor may plaintiffs rely upon some naturally-occurring rate or combination of deal protection measures, the existence of which will invoke the judicial blue pencil. Rather, plaintiffs must specifically demonstrate how a given set of deal protections operate in an unreasonable, preclusive, or coercive manner, under the standards of this Court's *Unocal* jurisprudence, to inequitably harm shareholders.").

[100] *Crawford*, 918 A.2d at 1181 n.10 (emphasis omitted).

[101] *Paramount Commc'ns, Inc.* v. *Time Inc. (Time-Warner)*, 571 A.2d 1140, 1153 (Del. 1990).

[102] *Compare Gilbert* v. *El Paso Co.*, 575 A.2d 1131, 1143-44 (Del. 1990) (holding that because all of the board's actions were in response to an unsolicited tender offer seeking control of company, *Unocal* standard applied throughout), *with In re Santa Fe Pac. Corp. S'holder Litig.*, C.A. No. 13587, 1995 WL 334258, at *9 n.7 (Del. Ch. May 31, 1995) (holding that the board's decision to enter into original stock-for-stock merger was subject to business judgment review, but altered transaction in response to unsolicited third-party offer must be subjected to enhanced scrutiny under *Unocal*), *aff'd in part*, *rev'd in part*, 669 A.2d 59 (Del. 1995); *Time-Warner*, 571 A.2d at 1151 n.14 (holding that original plan of merger entered into as part of corporate strategy subject to business judgment rule, while later actions in response to hostile tender offer are subject to enhanced *Unocal* standard).

[103] *Blasius Indus., Inc.* v. *Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

[104] *MM Cos.* v. *Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003).

[105] *Id.* at 1132 (invalidating addition of two board seats for the purpose of impeding stockholder franchise in a contested election, by diminishing influence of stockholder's nominees).

[106] *Mercier* v. *Inter-Tel (Del.), Inc.*, 929 A.2d 786, 808 (Del. Ch. 2007).

[107] *MM Cos.*, 813 A.2d at 1131; *Stroud* v. *Grace*, 606 A.2d 75, 91 (Del. 1992); *see also Pell* v. *Kill*, 135 A.3d 764, 785 & n.9, 797 n.14 (Del. Ch. 2016).

[108] *Mercier*, 929 A.2d at 809-10; *see also Chesapeake Corp.* v. *Shore*, 771 A.2d 293, 323 (Del. Ch. 2000) ("[I]t may be optimal simply for Delaware courts to infuse our *Unocal* analyses with the spirit animating *Blasius* and not hesitate to use our remedial powers where an inequitable distortion of corporate democracy has occurred.").

[109] *Encite LLC* v. *Soni*, C.A. No. 2476-VCG, 2011 WL 5920896, at *20 (Del. Ch. Nov. 28, 2011) (internal quotation marks omitted).

[110] *Emerald Partners* v. *Berlin*, 787 A.2d 85, 92 (Del. 2001).

[111] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 596 (Del. Ch. 2007).

[112] *N.J. Carpenters Pension Fund* v. *infoGROUP, Inc.*, C.A. No. 5334-VCN, 2011 WL 4825888, at *11 (Del. Ch. Oct. 6, 2011).

[113] *Ams. Mining Corp*. v. *Theriault*, 51 A.3d 1213, 1240 (Del. 2012).

[114] *See In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, Cons. C.A. No. 11202-VCS, 2017 WL 3568089, at *11 (Del. Ch. Aug. 18, 2017) (noting that a controller not standing on both sides of the transaction "can nonetheless 'compete' with the minority by leveraging its controller status to cause the acquiror to divert consideration to the controller that would otherwise be paid into the deal").

[115] *See, e.g.*, *Ivanhoe Partners* v. *Newmont Mining Corp*., 535 A.2d 1334 (Del. 1987).

[116] *See Harbor Fin. Partners* v. *Huizenga*, 751 A.2d 879, 887 & n.20 (Del. Ch. 1999); *see also Cede & Co.* v. *Technicolor, Inc.* (Technicolor I), 634 A.2d 345, 362 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994).

[117] *See, e.g.*, *O'Reilly* v. *Transworld Healthcare, Inc.*, 745 A.2d 902, 913 (Del. Ch. 1999).

[118] *See, e.g.*, *Harbor Fin. Partners*, 751 A.2d 879.

[119] *See, e.g.*, *Kahn* v. *Tremont Corp.*, 694 A.2d 422 (Del. 1997).

[120] *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013).

[121] *See Solomon* v. *Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000); *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999); *see also LC Capital Master Fund, Ltd.* v. *James*, 990 A.2d 435, 451 (Del. Ch. 2010).

[122] *In re MultiPlan Corp. S'holders Litig.*, 2022 WL 24060, at *17-19 (Del. Ch. Jan. 3, 2022).

[123] *Id.*

[124] *Id.* at *22.

[125] *Cinerama, Inc.* v. *Technicolor, Inc. (Technicolor II)*, 663 A.2d 1134, 1153 (Del. Ch. 1994) (internal citations omitted), *aff'd*, *Cinerama, Inc.* v. *Technicolor, Inc. (Technicolor III)*, 663 A.2d 1156 (Del. 1995).

[126] *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); *accord Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994) (quoting *Weinberger*, 457 A.2d at 711).

[127] *Weinberger*, 457 A.2d at 711.

[128] *Technicolor II*, 663 A.2d at 1143.

[129] *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015).

[130] *In re Sea-Land Corp. S'holders Litig.*, C.A. No. 8453, 1988 WL 49126, at *3 (Del. Ch. May 13, 1988).

[131] *Basho Techs. Holdco B, LLC* v. *Georgetown Basho Inv'rs, LLC*, C.A. No. 11802-VCL, 2018 WL 3326693, at *26 (Del. Ch. July 6, 2018) (quoting *Superior Vision Servs., Inc.* v. *ReliaStar Life Ins. Co.*, C.A. No. 1668-N, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006)).

[132] *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 551-52 (Del. Ch. 2003).

[133] *In re W. Nat'l Corp. S'holders Litig.*, C.A. No. 15927, 2000 WL 710192 (Del. Ch. May 22, 2000).

[134] *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).

[135] *Id.* at *15-16, *19.

[136] *Id.* at *17.

[137] *FrontFour Capital Grp. LLC* v. *Taube*, C.A. No. 2019-0100-KSJM, 2019 WL 1313408, at *21-22, *25 (Del. Ch. Mar. 11, 2019).

[138] *Sciabacucchi* v. *Liberty Broadband Corp.*, C.A. No. 11418-VCG, 2017 WL 2352152, at *17 (Del. Ch. May 31, 2017).

[139] *Williamson* v. *Cox Commc'ns, Inc.*, C.A. No. 1663-N, 2006 WL 1586375, at *2-5 & n.4 (Del. Ch. June 5, 2006).

[140] *Sciabacucchi*, 2017 WL 2352152, at *17-18. The Court subsequently denied a motion to add back the controlling stockholder claims, concluding that subsequent factual developments were insufficient to overcome the effect of the Court's previous dismissal with prejudice. *Sciabacucchi* v. *Malone*, 2021 WL 3662394, at *1 (Del. Ch. Aug. 18, 2021).

[141] *In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326, at *20-21 (Del. Ch. May 25, 2021).

[142] *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 983 (Del. Ch. 2014), *aff'd sub nom. Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

[143] *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711-VCS, 2018 WL 1560293, at *18-19 (Del. Ch. Mar. 28, 2018); *In re Zhongpin Inc. Stockholders Litig.*, C.A. No. 7393-VCN, 2014 WL 6735457, at *7-8 (Del. Ch. Nov. 26, 2014), *rev'd on other grounds sub nom. In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173 (Del. 2015).

[144] *Zhongpin*, 2014 WL 6735457, at *7-8.

[145] *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *39-40 (Del. Ch. May 6, 2021).

[146] *In re Hansen Med., Inc. Stockholder Litig.*, C.A. No. 12316-VCMR, 2018 WL 3025525, at *8 (Del. Ch. June 18, 2018).

[147] *Garfield* v. *BlackRock Mortgage Ventures, LLC*, C.A. No. 2018-0917-KSJM, 2019 WL 7168004 (Del. Ch. Dec. 20, 2019).

[148] *Sheldon* v. *Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 252 (Del. 2019) (internal quotation marks omitted).

[149] *Sheldon*, 220 A.3d at 255.

[150] *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711-VCS, 2018 WL 1560293, at *18-19 (Del. Ch. Mar 28, 2018); *Zhongpin*, 2014 WL 6735457, at *7-8.

[151] *In re Tele-Commc'ns, Inc. S'holders Litig.*, C.A. No. 16470, 2005 WL 3642727, at *11 (Del. Ch. Dec. 21, 2005).

[152] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, C.A. No. 758-CC, 2009 WL 3165613, at *12, *18 (Del. Ch. 2009); *see also In re John Q. Hammons Hotels Inc. S'holder Litig.*, C.A. No. 758-CC, 2011 WL 227634 (Del. Ch. Jan. 14, 2011).

[153] In reaching its decision, the Court noted that the members of the special committee were "highly qualified" and had "extensive experience," "understood their authority and duty to reject any offer that was not fair to the unaffiliated stockholders" and were "thorough, deliberate, and negotiated at arm's length with [multiple bidders] over a nine month period to achieve the best deal available for the minority stockholders." *John Q. Hammons*, 2011 WL 227634, at *2.

[154] *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144–VCG, 2012 WL 729232 (Del. Ch. Mar. 6, 2012).

[155] *Id* at *7.

[156] *Id.* at *16.

[157] *Id.* at *19, *21.

[158] *See Kahn* v. *Tremont Corp.*, 694 A.2d 422 (Del. 1997); *Kahn* v. *Lynch Commc'n Sys., Inc.,* 638 A.2d 1110 (Del. 1994); *Rosenblatt* v. *Getty Oil Co.*, 493 A.2d 929 (Del. 1985).

[159] *Ams. Mining Corp*. v. *Theriault*, 51 A.3d 1213, 1243 (Del. 2012).

[160] *Id.* at 1244.

[161] *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635, 639, 642 (Del. 2014).

[162] *See, e.g.*, *Gesoff* v. *IIC Indus. Inc.*, 902 A.2d 1130 (Del. Ch. 2006) (criticizing a special committee that did not bargain effectively, had limited authority, and was advised by legal and financial advisors selected by the controlling shareholder); *In re Tele-Commc'ns, Inc. S'holders Litig.*, C.A. No. 16470, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005); *In re Emerging Commc'ns, Inc. S'holders Litig.*, C.A. No. 16415, 2004 WL 1305745 (Del. Ch. June 4, 2004) (criticizing a special committee that never met to consider the transaction together).

[163] *Del. Cty. Emps.' Ret. Fund* v. *Sanchez*, 124 A.3d 1017, 1019 (Del. 2015).

[164] *See Orman* v. *Cullman*, C.A. No. 18039, 2004 WL 2348395, at *5 (Del. Ch. Oct. 20, 2004).

[165] *Cf. Kahn* v. *Tremont Corp.*, 694 A.2d 422 (Del. 1997) (reversing trial court's decision to place burden of proving unfairness on plaintiffs in part on the Delaware Supreme Court's finding that three members of the special committee had previous affiliations with the buyer and received financial compensation or influential positions from the buyer).

[166] *Emerging Commc'ns*, 2004 WL 1305745.

[167] *Harbor Fin. Partners* v. *Huizenga*, 751 A.2d 879 (Del. Ch. 1999); *see also Mizel* v. *Connelly*, C.A. No. 16638, 1999 WL 550369, at *4 (Del. Ch. Aug. 2, 1999) (stating that close familial ties should "go a long (if not the whole) way toward creating a reasonable doubt" as to independence).

[168] *Sanchez*, 124 A.3d at 1019.

[169] *Sandys* v. *Pincus*, 152 A.3d 124, 135 (Del. 2016).

[170] *Id.* at 126.

[171] *Cumming* v. *Edens*, C.A. No. 13007-VCS, 2018 WL 992877, at *14-16 (Del. Ch. Feb. 20, 2018).

[172] *Id.* at *16.

[173] *In re Oracle Corp. Derivative Litig.*, C.A. No. 2017-0337-SG, 2018 WL 1381331, at *17 (Del. Ch. Mar. 19, 2018).

[174] *Id.*

[175] *See also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808 (Del. Ch. 2005) (dismissing plaintiffs' claims that the acquiror "overpaid" for the target because claims were derivative and therefore could not survive if a majority of the acquiror's board was independent, and concluding that the overwhelming majority of directors were in fact independent, despite directors' various business relationships with the acquiror and (in some cases) leadership positions held by directors of charitable institutions that were alleged to be major recipients of the acquiror's corporate giving), *aff'd*, 906 A.2d 766 (Del. 2006).

[176] *Yucaipa Am. All. Fund II, L.P.* v. *Riggio*, 1 A.3d 310 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011).

[177] *See Citron* v. *Fairchild Camera & Instrument Corp.*, 569 A.2d 53 (Del. 1989).

[178] *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 997 (Del. Ch. 2014).

[179] *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635, 639, 649 (Del. 2014).

[180] *Id.* at 648 n.26.

[181] *Sandys* v. *Pincus*, 152 A.3d 124, 133 (Del. 2016).

[182] *Id.* at 134.

[183] *In re Plains Expl. & Prod. Co. Stockholder Litig.*, C.A. No. 8090-VCN, 2013 WL 1909124, at *5 (Del. Ch. May 9, 2013) (quoting *Gesoff* v. *IIC Indus. Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006)).

[184] *See Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994).

[185] *See, e.g.*, *Technicolor I*, 634 A.2d 345 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994).

[186] *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176 (Del. Ch. 2000).

[187] *McMullin* v. *Beran*, 765 A.2d 910 (Del. 2000).

[188] *Rabkin* v. *Olin Corp.*, C.A. No. 7547, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990), *aff'd*, 586 A.2d 1202 (Del. 1990); *accord Kahn* v. *Dairy Mart Convenience Stores, Inc.*, C.A. No. 12489, 1996 WL 159628, at *6 (Del. Ch. Mar. 29, 1996).

[189] *In re Dole Food Co. Stockholder Litig.*, C.A. Nos. 8703-VCL, 9079-VCL, 2015 WL 5052214, at *29-30 (Del. Ch. Aug. 27, 2015) (quoting *Kahn* v. *Tremont Corp.*, C.A. No. 12339, 1996 WL 145452, at *16 (Del. Ch. Mar. 21, 1996), *rev'd*, 694 A.2d 422 (Del. 1997)).

[190] *ACP Master, Ltd.* v. *Sprint Corp.*, C.A. Nos. 8508-VCL, 9042-VCL, 2017 WL 3421142, at *23 (Del. Ch. July 21, 2017); *see also In re Dole Food Co.*, 2015 WL 5052214, at *29.

[191] *Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994).

[192] *See Gesoff* v. *IIC Indus. Inc.*, 902 A.2d 1130, 1150 (Del. Ch. 2006).

[193] *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 30 A.3d 60 (Del. Ch. 2011), *revised and superseded*, 52 A.3d 761 (Del. Ch. 2011).

[194] *Id.* at 97-98.

[195] *See Ams. Mining Corp*. v. *Theriault*, 51 A.3d 1213 (Del. 2012).

[196] *See La. Mun. Police Emps.' Ret. Sys.* v. *Fertitta*, C.A. No. 4339-VCL, 2009 WL 2263406, at *8 n.34 (Del. Ch. July 28, 2009).

[197] *Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994).

[198] *ACP Master, Ltd.* v. *Sprint Corp.*, C.A. Nos. 8508-VCL, 9042-VCL, 2017 WL 3421142 (Del. Ch. July 21, 2017).

[199] *Id.* at *29.

[200] *Id.*

[201] *See, e.g.*, *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 90 (Del. Ch. 2014).

[202] *See, e.g.*, *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, C.A. No. 7141-VCL, 2015 WL 1815846 (Del. Ch. Apr. 20, 2015).

[203] *Mills Acquisition Co.* v. *Macmillan, Inc.*, 559 A.2d 1261, 1279-80 (Del. 1989).

[204] *In re Tele-Commc'ns, Inc. S'holders Litig.*, C.A. No. 16470, 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005).

[205] *Gesoff* v. *IIC Indus. Inc.*, 902 A.2d 1130 (Del. Ch. 2006).

[206] *In re Emerging Commc'ns, Inc. S'holders Litig.*, C.A. No. 16415, 2004 WL 1305745, at *32 (Del. Ch. June 4, 2004).

[207] *See, e.g.*, *RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816, 864 (Del. 2015).

[208] *See, e.g.*, *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 737 (Del. Ch. 1999), *aff'd sub nom. Walker* v. *Lukens, Inc.*, 757 A.2d 1278 (Del. 2000); *Schiff* v. *RKO Pictures Corp.*, 104 A.2d 267, 270-72 (Del. Ch. 1954).

[209] *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 305-06 (Del. 2015).

[210] *Id.* at 312-14.

[211] *Id.* at 309-11 & n.19 (distinguishing *Gantler* v. *Stephens*, 965 A.2d 695, 713-14 (Del. 2009)).

[212] *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727, 747 (Del. Ch. 2016) ("I conclude that the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) has the same cleansing effect under *Corwin* as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority."), *aff'd* 156 A.3d 697 (Del. 2017) (TABLE); *see also Larkin* v. *Shah*, C.A. No. 10918-VCS, 2016 WL 4485447, at *1 (Del. Ch. Aug. 25, 2016) (applying *Corwin* to tender offer under 8 *Del. C.* § 251(h)).

[213] *Singh* v. *Attenborough*, 137 A.3d 151, 151-52 (Del. 2016).

[214] *Id.* at 152.

[215] *Id.* at 152-53.

[216] *Larkin*, 2016 WL 4485447, at *13; *see also In re Solera Holdings, Inc. Stockholder Litig.*, C.A. No. 11524-CB, 2017 WL 57839, at *6 n.28 (Del. Ch. Jan. 5, 2017); Order, *Chester Cty. Ret. Sys.* v. *Collins*, C.A. No. 12072-VCL, 2016 WL 7117924, at *2 (Del. Ch. Dec. 6, 2016).

[217] *In re Merge Healthcare Inc. S'holders Litig.*, C.A. No. 11388-VCG, 2017 WL 395981, at *7 (Del. Ch. Jan. 30, 2017) (noting that an unconflicted controller would not exempt a transaction from cleansing under *Corwin*); *Larkin*, 2016 WL 4485447, at *13.

[218] *In re Solera*, 2017 WL 57839, at *7-8; *see also Morrison* v. *Berry*, 191 A.3d 268, 282 n.60 (Del. 2018) (endorsing framework).

[219] *In re Solera*, 2017 WL 57839, at *7.

[220] *See Corwin*, 125 A.3d at 312 ("[I]f troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked."). The materiality standard required under *Corwin* is the same standard applied elsewhere under Delaware law, which tracks the federal securities laws. *See In re Solera*, 2017 WL 57839, at *9.

[221] *See Nguyen* v. *Barrett*, C.A. No. 11511-VCG, 2016 WL 5404095, at *7 (Del. Ch. Sept. 28, 2016).

[222] *See In re Merge Healthcare*, 2017 WL 395981, at *10 (noting the Court's preference to remedy disclosure deficiencies before closing but declining to consider whether failure to do so prevents using disclosures to circumvent *Corwin*).

[223] *Morrison*, 191 A.3d at 284-88.

[224] *Id.* at 272.

[225] *Appel* v. *Berkman*, 180 A.3d 1055 (Del. 2018).

[226] *In re Xura, Inc. Stockholder Litig.*, C.A. No. 12698-VCS, 2018 WL 6498677, at *12 (Del. Ch. Dec. 10, 2018).

[227] *Chester Cty. Emps.' Ret. Fund* v. *KCG Holdings, Inc.*, C.A. No. 2017-0421-KSJM, 2019 WL 2564093, at *12 (Del. Ch. June 21, 2019).

[228] *In re USG Corp. S'holder Litig.*, No. CV 2018-0602-SG, 2020 WL 5126671, at *2 (Del. Ch. Aug. 31, 2020), *aff'd sub nom. Anderson* v. *Leer*, __ A.3d __, 2021 WL 5232346 (Del. Nov. 10, 2021).

[229] *In re Merge Healthcare*, C.A. No. 11388-VCG, 2017 WL 395981, at *6 (Del. Ch. Jan. 30, 2017); *Larkin* v. *Shah*, C.A. No. 10918-VCS, 2016 WL 4485447, at *9, *12 (Del. Ch. Aug. 25, 2016) ("Coercion is deemed inherently present in controlling stockholder transactions of both the one-sided and two-sided variety, but not in transactions where the concerns justifying some form of heightened scrutiny derive solely from board-level conflicts or lapses of due care.").

[230] *Sciabacucchi* v. *Liberty Broadband Corp.*, C.A. No. 11418-VCG, 2017 WL 2352152, at *17-18 (Del. Ch. May 31, 2017).

[231] *Id.* at *20.

[232] *Id.* at *21-22.

[233] *In re Saba Software, Inc. Stockholder Litig.*, C.A. No. 10697-VCS, 2017 WL 1201108, at *15-16 (Del. Ch. Mar 31, 2017).

[234] *In re Massey Energy Co. Derivative & Class Action Litig.*, 160 A.3d 484, 507 (Del. Ch. 2017).

[235] *Lavin* v. *W. Corp.*, C.A. No. 2017-0547-JRS, 2017 WL 6728702, at *10 (Del. Ch. Dec. 29, 2017).

[236] *In re Paramount Gold & Silver Corp. Stockholders Litig.*, C.A. No. 10499-CB, 2017 WL 1372659, at *6-9, *14 (Del. Ch. Apr. 13, 2017).

[237] *See In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, Cons. C.A. No. 11202-VCS, 2017 WL 3568089, at *16-18 (Del. Ch. Aug. 18, 2017); *IRA Trust FBO Bobbie Ahmed* v. *Crane*, C.A. No. 12742-CB, 2017 WL 6335912, at *11 (Del. Ch. Dec. 11, 2017); *see also In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, C.A. No. 9962-VCL, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).

[238] *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014).

[239] *Id.* at 644.

[240] *Id.* at 646.

[241] *Flood* v. *Synutra Int'l, Inc.*, 195 A.3d 754, 762 (Del. 2018).

[242] *Olenik* v. *Lodzinski*, 208 A.3d 704, 717 (Del. 2019).

[243] *Id.*

[244] *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748 (Del. Ch. June 11, 2020).

[245] *Id.* at *27.

[246] *Id.* at *5, *32, *35.

[247] *In re Books-A-Million Stockholders Litig.*. Cons. C.A. No. 11343-VCL, 2016 WL 5874974, at *11 (Del. Ch. Oct. 10, 2016).

[248] *Id.* at *15-16.

[249] *Id.* at *15.

[250] *Arkansas Teacher Ret. Sys.* v. *Alon USA Energy, Inc.*, 2019 WL 2714331, at *19 (Del. Ch. June 28, 2019).

[251] *Id.* at *20.

[252] *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, Cons. C.A. No. 11202-VCS, 2017 WL 3568089, at *16-18 (Del. Ch. Aug. 18, 2017).

[253] *Id.*

[254] *IRA Trust FBO Bobbie Ahmed* v. *Crane*, C.A. No. 12742-CB, 2017 WL 6335912, at *11 (Del. Ch. Dec. 11, 2017).

[255] *Tornetta* v. *Musk*, C.A. No. 2018-0408-JRS, 2019 WL 4566943 (Del. Ch. Sept. 20, 2019).

[256] *Martin Marietta Materials, Inc.* v. *Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012), *aff'd*, 68 A.3d 1208 (Del. 2012).

[257] Order, *Depomed Inc.* v. *Horizon Pharma, PLC*, No. 1-15-CV-283834, 2014 WL 7433326 (Cal. Super. Ct. Nov. 19, 2015).

[258] *Id.* at *2-3.

[259] *See RAA Mgmt., LLC* v. *Savage Sports Holdings, Inc.*, 45 A.3d 107 (Del. 2012).

[260] *PharmAthene, Inc.* v. *SIGA Techs., Inc.*, C.A. No. 2627-VCP, 2010 WL 4813553, at *2 (Del. Ch. Nov. 23, 2010) (citing *Hindes* v. *Wilmington Poetry Soc'y*, 138 A.2d 501, 502-04 (Del. Ch. 1958)).

[261] Tr. of Oral Arg., *Glob. Asset Capital, LLC* v. *Rubicon US Reit, Inc.*, C.A. No. 5071-VCL (Del. Ch. Nov. 16, 2009), *available at* https://www.delawarelitigation.com/uploads/file/int6A4.PDF.

[262] *Id*.

[263] *SIGA Techs., Inc.* v. *PharmAthene, Inc.*, 67 A.3d 330, 336 (Del. 2013).

[264] *Id*. at 346-47.

[265] *Id.* at 346.

[266] *C&J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1067 (Del. 2014) (quoting *Barkan* v. *Amsted Indus., Inc.*, 567 A.2d

1279, 1286 (Del. 1989)); *Paramount Commc'ns Inc.* v. *QVC Network Inc. (QVC)*, 637 A.2d 34, 44 (Del. 1994).

[267] *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 242 (Del. 2009).

[268] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007).

[269] *In re Fort Howard Corp. S'holders Litig.*, C.A. No. 9991, 1988 WL 83147 (Del. Ch. Aug. 8, 1988).

[270] *See, e.g.*, *In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9 (Del. Ch. 2004) (denying shareholder plaintiffs' request for injunctive relief based upon allegations that the MONY board of directors, having decided to put the company up for sale, failed to fulfill their fiduciary duties by foregoing an auction in favor of entering into a merger agreement with a single bidder and allowing for a post-signing market check).

[271] *In re Smurfit-Stone Container Corp. S'holder Litig.*, C.A. No. 6164-VCP, 2011 WL 2028076, at *19 n.133 (Del. Ch. May 24, 2011).

[272] *Fort Howard*, 1988 WL 83147; *see C&J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1070 (Del. 2014) ("In prior cases like *In re Fort Howard Corporation Shareholders Litigation*, this sort of passive market check was deemed sufficient to satisfy *Revlon*.").

[273] *Fort Howard*, 1988 WL 83147, at *13.

[274] *In re Plains Expl. & Prod. Co. Stockholder Litig.*, C.A. No. 8090-VCN, 2013 WL1909124 at *5 (Del. Ch. May 9, 2013) (citing *In re Pennaco Energy, Inc.*, 787 A.2d 691, 707 (Del. Ch. 2001)).

[275] *Koehler* v. *NetSpend Holdings Inc.*, C.A. No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013).

[276] *Id.* at *19.

[277] *Id.* at *20.

[278] *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 86-87 (Del. Ch. 2007); *see also In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 119-20 (Del. Ch. 2007).

[279] *In re Topps*, 926 A.2d at 86.

[280] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011).

[281] *Cinerama, Inc.* v. *Technicolor, Inc. (Technicolor II)*, 663 A.2d 1134, 1142 (Del. Ch. 1994).

[282] *See generally* Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone,* 70 BUS. LAW. 679 (May 2015).

[283] *See, e.g.*, *Smith* v. *Van Gorkom (Trans Union)*, 488 A.2d 858, 876-77 (Del. 1985).

[284] *Varjabedian* v. *Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018).

[285] *In re PLX Tech. Inc. Stockholders Litig.*, C.A. No. 9880-VCL, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018).

[286] *Id.*

[287] *Scott* v. *DST Sys., Inc.*, C.A. Nos. 18-cv-00286-RGA, 18-cv-00322-RGA, 2019 WL 3997097 (D. Del. Aug. 23, 2019).

[288] *See* Tr. of Ruling of the Ct. on Pls.' Mot. For a Prelim. Inj. at 15, *Steinhardt* v. *Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. Jan. 24, 2011) (ordering disclosure concerning, among other things, "what appear to be longitudinal changes from previous Jefferies' books that resulted in the final book making the deal look better than it would have had the same metrics been used that were used in prior books").

[289] *See, e.g.*, *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 (Del. Ch. 2012).

[290] *See* Self-Regulatory Organizations, SEC Release No. 34-56645, 91 SEC Docket 2216 (Oct. 11, 2007).

[291] *See* FINRA Manual, FINRA Rule 5150.

[292] *In re Tele-Commc'ns, Inc. S'holders Litig.*, C.A. No. 16470, 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005).

[293] *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1005 (Del. Ch. 2005).

[294] *Id*.

[295] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011).

[296] *Id.* at 835 (internal quotations and citations omitted).

[297] *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54 (Del. Ch. 2014).

[298] *Id*. at 100.

[299] *RBC Capital Mkts., LLC* v. *Jervis,* 129 A.3d 816, 865 (Del. 2015).

[300] *Id.* at 866.

[301] *Id*. at 855 n.129.

[302] *Id*. at 856.

[303] *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr.* v. *Presidio, Inc.*, 251 A.3d 212, 267 (Del. Ch. 2021).

[304] *Id*. at 267–68.

[305] *Id*. at 272.

[306] *Id*. at 269.

[307] *See, e.g.*, *In re Zale Corp. Stockholders Litig.*, C.A. No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015); *Singh* v. *Attenborough*, 137 A.3d 151 (Del. 2016).

[308] *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

[309] *Singh* v. *Attenborough*, 137 A.3d at 151-52.

[310] *In re Volcano Corp. Stockholder Litig*., 143 A.3d 727, 750 (Del. Ch. 2016); *In re Volcano Corp. Stockholder Litig*., 156 A.3d 697 (Del. 2017).

[311] *Buttonwood Tree Value Partners L.P.* v. *R.L. Polk & Co.,* C.A. No. 9250-VCG, 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017).

[312] *Id.* at *11.

[313] *Singh* v. *Attenborough*, 137 A.3d at 153.

[314] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011).

[315] *Vento* v. *Curry*, C.A. No. 2017-0157-AGB, 2017 WL 1076725, at *4 (Del. Ch. Mar. 22, 2017).

[316] *Id.*; *cf.*, Order, *In re Columbia Pipeline Grp., Inc. S'holder Litig.*, C.A. No. 12152-VCL, 2017 WL 898382, at *4 (Del. Ch. Mar. 7, 2017) (citing *In re Micromet, Inc. S'holders Litig.*, C.A. No. 7197-VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2012), as dispositive authority that disclosure of a sell-side investment advisor's financial interest in the buyer in its Form 13F (and not in the merger proxy statement) is sufficient disclosure, particularly where the balance of the investment advisor's ownership does not create an economic conflict).

[317] *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr.* v. *Presidio, Inc.*, 251 A.3d 212, 260–63 (Del. Ch. 2021).

[318] *English* v. *Narang*, C.A. No. 2018-0221-AGB, 2019 WL 1300855 (Del. Ch. Mar. 20, 2019).

[319] *In re Rouse Props., Inc.*, Cons. C.A. No. 12194-VCS, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018).

[320] SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Tender Offers and Schedules, Questions and Answers of General Applicability, last updated November 18, 2016, *available at* https://www.sec.gov/divisions/corpfin/guidance/cdi-tender-offers-and-schedules.htm.

[321] 17 C.F.R. § 229.1015(b).

[322] *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 177 (Del. Ch. 2007); *see also Maric Capital Master Fund, Ltd.* v. *PLATO Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) ("[I]n my view, management's best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information.").

[323] *In re 3Com S'holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at *3 (Del. Ch. Dec. 18, 2009) (holding that plaintiffs have failed to show how disclosure of full projections, instead of the summary provided by the financial advisors, would have altered the "total mix of available information"); *see also In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188 (Del. Ch. Nov. 1, 2007).

[324] *See David P. Simonetti Rollover IRA* v. *Margolis*, C.A. No. 3694-VCN, 2008 WL 5048692, at *10 (Del. Ch. June 27, 2008) (explaining that "Delaware law requires that directors disclose the substance of the investment banker's work, which usually depends in part upon management's best estimates," and holding that a proxy statement that discloses projections that "reflected management's best estimates at the time" instead of "lower-probability projections" meets the requirement to disclose projections that "would have been considered material by the reasonable stockholder").

[325] *In re Micromet, Inc. S'holders Litig.*, C.A. No. 7197-VCP, 2012 WL 681785, at *13 (Del. Ch. Feb. 29, 2012) (quoting *Globis Partners, L.P.* v. *Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *10 (Del. Ch. Nov. 30, 2007)) (holding that there is no legal requirement to disclose projections that present "overly optimistic 'what-ifs'").

[326] Tr. of Oral Arg. on Pls.' Mot. For Prelim. Inj. and Rulings of the Ct. at 24-28, *In re BEA Sys., Inc. S'holder Litig.*, C.A. No. 3298-VCL (Del. Ch. Mar. 26, 2008).

[327] *Id.* at 94.

[328] *In re Saba Software, Inc. Stockholder Litig.*, C.A. No. 10697-VCS, 2017 WL 1201108 at *25 (Del. Ch. Mar. 31, 2017).

[329] *In re Cyan, Inc. Stockholders Litig.*, C.A. No. 11027-CB, 2017 WL 1956955, at *17 (Del. Ch. May 11, 2017).

[330] *In re PLX Tech. Inc. Stockholders Litig*., C.A. No. 9880-VCL, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018).

[331] *English* v. *Narang*, C.A. No. 2018-0221-AGB, 2019 WL 1300855, at *10 (Del. Ch. Mar. 20, 2019).

[332] SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, last updated April 4, 2018, *available at* https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm.

[333] *Id.*

[334] John Coates, Acting Director, Division of Corporation Finance, "SPACs, IPOs and Liability Risk under the Securities Laws" (April 8, 2021), *available at* https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws; *see also* Anirban Sen and Chris Prentice, Joshua Franklin, "EXCLUSIVE U.S. watchdog mulls guidance to curb SPAC projections, liability shield – sources", REUTERS (Apr. 28, 2021), *available at* https://www.reuters.com/business/exclusive-us-watchdog-weighs-guidance-aimed-curbing-spac-projections-liability-2021-04-27/.

[335] 15 U.S. Code § 77z–2(b)(2)(D).

[336] *See* 2019 American Bar Association Private Target Mergers & Acquisitions Deal Points Study, at 116.

[337] Lockton, *Representations & Warranties Market Concerns vs. Market Reality* (Nov. 2021).

[338] *See* Igor Kirman, Ian Boczko and Nicholas C.E. Walters, "The Next Frontier for Representations and Warranties Insurance: Public M&A Deals?" (October 24, 2020), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, *available at* https://corpgov.law.harvard.edu/2020/10/24/the-next-frontier-for-representations-and-warranties-insurance-public-ma-deals/.

[339] For a discussion of the impact of transaction forms on anti-assignment and change-in-control provisions, *see generally*, *Meso Scale Diagnostics, LLC* v. *Roche Diagnostics GmbH*, 62 A.3d 62, 86-88 (Del. Ch. 2013).

[340] *See, e.g.*, DEL. CODE ANN. tit. 8, § 251(h) and § 253 (West 2010).

[341] 17 C.F.R. § 240.14e-1(a).

[342] *In re Siliconix Inc. S'holders Litig*., C.A. No. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001); *see also Glassman* v. *Unocal Expl. Corp*., 777 A.2d 242, 243 (Del. 2001).

[343] *In re CNX Gas Corp. S'holders Litig*., 4 A.3d 397 (Del. Ch. 2010); *see also In re Pure Res., Inc. S'holders Litig*., 808 A.2d 421 (Del. Ch. 2002); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005).

[344] *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[345] *See also In re Cornerstone Therapeutics Inc. Stockholder Litig.*, 115 A.3d 1173, 1184 n.45 (Del. 2015) (criticizing incentive structure created by the *Siliconix* line of cases).

[346] *See* DEL. CODE ANN. tit. 8, § 251(h) (West 2013).

[347] *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727 (Del. Ch. 2016).

[348] *Id.* at 744.

[349] SEC Compliance and Disclosure Interpretations, Going Private Transactions, Exchange Act Rule 13e-3 and Schedule 13E-3, 201.05.

[350] *See, e.g.*, *Smith* v. *Van Gorkom (Trans Union)*, 488 A.2d 858, 875 (Del. 1985).

[351] *Paramount Commc'ns Inc*. v. *QVC Network Inc. (QVC)*, 637 A.2d 34, 43 (Del. 1994).

[352] *Trans Union*, 488 A.2d at 876 (pointing to evidence that members of Trans Union's Board "knew that the market had consistently undervalued the worth of Trans Union's stock, despite steady increases in the Company's operating income in the seven years preceding the merger").

[353] *Paramount Commc'ns, Inc*. v. *Time Inc. (Time-Warner)*, 571 A.2d 1140, 1150 n.12 (Del. 1990).

[354] *Id*. at 1150; *see also id*. at 1154 ("Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."); *Frederick Hsu Living Tr.* v. *ODN Holding Corp.*, No. CV 12108-VCL, 2017 WL 1437308, at *18–19 (Del. Ch. Apr. 14, 2017) ("[T]he fiduciary relationship requires that the directors act prudently, loyally, and

in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital, as warranted for an entity with a presumptively perpetual life in which the residual claimants have locked in their investment. . . . The fact that some holders of shares might be market participants who are eager to sell and would prefer a higher near-term market price likewise does not alter the presumptively long-term fiduciary focus.").

[355] *Time-Warner*, 571 A.2d at 1153.

[356] *See Unocal Corp*. v. *Mesa Petroleum Co*., 493 A.2d 946 (Del. 1985); *Mills Acquisition Co*. v. *Macmillan, Inc.*, C.A. No. 10168, 1988 WL 108332 (Del. Ch. Oct. 18, 1988), *rev'd on other grounds*, 559 A.2d 1261 (Del. 1989). In the *Macmillan* case, the Delaware Supreme Court noted that it was legitimate for a board to consider the "effect on the various constituencies" of a corporation, the companies' long-term strategic plans and "any special factors bearing on stockholder and public interests" in reviewing merger offers. 559 A.2d at 1285 n.35.

[357] MD. CODE CORPS. & ASS'NS § 2-104(9) (2019) (permitting corporations to adopt a charter provision that allows the board of directors "in considering a potential acquisition of control of the corporation, to consider the effect of the potential acquisition of control on" other constituencies, employees, suppliers, customers, creditors, and communities in which the corporation's offices are located); OR. REV. STAT. § 60.357 (2019) (permitting directors to consider the social, legal and economic effects on constituencies other than shareholders "[w]hen evaluating any offer of another party to make a tender or exchange offer for any equity security of the corporation, or any proposal to merge or consolidate the corporation . . . or to purchase or otherwise acquire all or substantially all the properties and assets of the corporation").

[358] *See, e.g.*, Tr., *Norfolk S. Corp.* v. *Conrail Inc.*, C.A. No. 96-CV-7167 (E.D. Pa. Nov. 19, 1996) (concluding that Pennsylvania's constituency statute "provides that in considering the best interests of the corporation or the effects of any action, the directors are not required to consider the interests of any group, obviously including shareholders, as a dominant or controlling factor. . ."); *Georgia-Pac. Corp.* v. *Great N. Nekoosa Corp.*, 727 F. Supp. 31, 33 (D. Me. 1989) (justifying use of a poison pill in response to a cash tender offer partly on the basis of Maine's other constituency statute).

[359] *See* Minnesota Mining and Manufacturing Co., SEC No-Action Letter, 1988 WL 234978 (Oct. 13, 1988) (indicating that the following factors will be considered by the SEC to conclude that a CVR is not a security: (1) the CVR to be granted to the selling shareholders is an integral part of the consideration to be received in the proposed merger; (2) the holders of the CVR will have no rights common to stockholders, such as voting and dividend rights, nor will they bear a stated rate of interest; (3) the CVRs will not be assignable or transferable, except by operation of law; and (4) the CVRs will not be represented by any form of certificate or instrument).

[360] *NACCO Indus., Inc.* v. *Applica Inc.*, 997 A.2d 1, 19 (Del. Ch. 2009).

[361] *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Unocal*, 493 A.2d 946; *see also supra* Section II.B.2.

[362] *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1016 (Del. Ch. 2005).

[363] *Firefighters' Pension Sys. of City of Kansas City,* Missouri Tr. v. Presidio, Inc., 251 A.3d 212, 271 (Del. Ch. 2021).

[364] *Id.* at 1021.

[365] *See, e.g.*, *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 503-04 (Del. Ch. 2010) (citing *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 120 (Del. Ch. 2007)) (observing that the decision whether to view a termination fee's preclusive effect in terms of equity value or enterprise value will depend on the factual circumstances existing in a given case).

[366] *In re Answers Corp. S'holders Litig.*, C.A. No 6170-VCN, 2011 WL 1366780, at *4 n.52 (Del. Ch. Apr. 11, 2011).

[367] *In re Comverge, Inc. S'holders Litig.*, Consol. C.A. No. 7368-VCP, 2014 WL 6686570, at *15-17 (Del. Ch. Nov. 25, 2014).

[368] *La. Mun. Police Emps.' Ret. Sys.* v. *Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007).

[369] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 575 (Del. Ch. 2010).

[370] *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 86 (Del. Ch. 2007).

[371] *Answers*, 2011 WL 1366780, at *4 n.52 (noting that, in the context of a relatively small transaction, a "somewhat higher than midpoint on the 'range' is not atypical").

[372] *Phelps Dodge Corp.* v. *Cyprus Amax Minerals Co.*, C.A. Nos. 17398, 17383, 17427, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999).

[373] *Id.* at *2.

[374] *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 656-57 (Del. Ch. 2008).

[375] *See H.F. Ahmanson & Co.* v. *Great W. Fin. Corp.*, C.A. No. 15650, 1997 WL 305824 (Del. Ch. June 3, 1997).

[376] *NACCO Indus., Inc.* v. *Applica Inc.*, 997 A.2d 1, 19 (Del. Ch. 2009). This principle also comes into play when a party claims that a target should be required to take actions in contravention of its obligations under a no-shop. In *C&J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049 (Del. 2014), the Delaware Supreme Court reversed the grant of a mandatory preliminary injunction that required the target company to shop itself in violation of a contractually bargained no-shop provision. The Delaware Court of Chancery had ruled that the board of the selling company had violated its fiduciary duties and enjoined the stockholder vote for 30 days while the selling company could undertake an active market check. The Delaware Supreme Court held that the judicial waiver of the no-shop clause was an error because the buyer was an "innocent third party" and, even on facts determined after trial, "a judicial decision holding a party to its contractual obligations while stripping it of bargained-for benefits should only be undertaken on the basis that the party ordered to perform was fairly required to do so, because it had, for example, aided and abetted a breach of fiduciary duty." *Id.* at 1054, 1072.

[377] *Id.* at 1072 n.110 (quoting *OTK Assocs. LLC* v. *Friedman*, 85 A.3d 696, 720 n.2 (Del. Ch. 2014)).

[378] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011).

[379] *Id.* at 841 (quoting *ACE Ltd.* v. *Capital Re Corp.*, 747 A.2d 95, 105-06 (Del. Ch. 1999)).

[380] *Paramount Commc'ns Inc.* v. *QVC Network Inc. (QVC)*, 637 A.2d 34, 47-48 (Del. 1994).

[381] *Phelps Dodge Corp.* v. *Cyprus Amax Minerals Co.*, C.A. Nos. 17398, 17383, 17427. 1999 WL 1054255, at *1 (Del. Ch. Sept. 27, 1999).

[382] Tr. of Telephonic Oral Arg. and Ruling of the Ct., *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, 2012 WL 9989212 (Del. Ch. Nov. 27, 2012).

[383] *Id.* at 18.

[384] Tr. of Ruling of the Ct., *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012).

[385] *See also Koehler* v. *NetSpend Holdings Inc.*, C.A. No. 8373-VCG, 2013 WL 2181518, at *18 (Del. Ch. May 21, 2013).

[386] *In re Columbia Pipeline Grp., Inc.*, No. CV 2018-0484-JTL, 2021 WL 772562, at *33 (Del. Ch. Mar. 1, 2021).

[387] *See Frontier Oil Corp.* v. *Holly Corp.*, C.A. No. 20502, 2005 WL 1039027, at *27 (Del. Ch. Apr. 29, 2005) ("The Merger Agreement, of course, was not an ordinary contract. Before the Merger could occur, the shareholders of Holly had to approve it. The directors of Holly were under continuing fiduciary duties to the shareholders to evaluate the proposed transaction. The Merger Agreement accommodated those duties by allowing, under certain circumstances, the board of directors to withdraw or change its recommendation to the shareholders that they vote for the Merger.").

[388] Tr. of Telephonic Ruling of the Ct. at 18, *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, 2012 WL 9989211 (Del. Ch. Nov. 9, 2012).

[389] Tr. of Oral Arg. at 133, *In re NYSE Euronext S'holders Litig.*, C.A. 8136-CS (Del. Ch. May 10, 2013).

[390] *See* DEL. CODE ANN. tit. 8, § 146 (West 2011).

[391] *Omnicare, Inc.* v. *NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

[392] *Id.* at 946.

[393] *See Monty* v. *Leis*, 123 Cal. Rptr. 3d 641, 646 (Ct. App. 2011) (quoting *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1016 n.68 (Del. Ch. 2005), for the proposition that *Omnicare* "'represents . . . an aberrational departure from [the] long accepted principle' that what matters is whether the board acted reasonably in light of all the circumstances").

[394] *See Orman* v. *Cullman*, C.A. No. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004); *see also Majority Shareholders' Voting Agreement Not Impermissible Lock-Up, Del. Court Says*, 7 M&A L. REP. 863 (Nov. 8, 2004).

[395] *Koehler* v. *NetSpend Holdings Inc.,* C.A. No. 8373-VCG, 2013 WL 2181518, at *17 (Del. Ch. May 21, 2013).

[396] Examples of such structures include: The Hillshire Brands Company's terminated acquisition of Pinnacle Foods Inc. (2014), Martin Marietta Materials, Inc.'s acquisition of Texas Industries, Inc. (2014), and Patterson-UTI Energy, Inc.'s acquisition of Seventy Seven Energy Inc. (2017).

[397] *In re OPENLANE, Inc. S'holders Litig.*, C.A. No. 6849-VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011); *see also Optima Int'l of Miami, Inc.* v. *WCI Steel, Inc.*, C.A. No. 3833-VCL, 2008 WL 3822429 (Del. Ch. June 17, 2008) (distinguishing *Omnicare* and rejecting an argument that a shareholder's written consent, which was received within a day of the target board's approval of the merger agreement, was impermissible under the *Omnicare* analysis).

[398] *See* SEC Compliance and Disclosure Interpretation, Securities Act Section 239.13 (Nov. 26, 2008), *available at* https://www.sec.gov/divisions/corpfin/guidance/sasinterp.htm.

[399] AM. BAR ASS'N, *supra* note 361, at 62.

[400] *Id.* at 61, 63.

[401] *In re BioClinica, Inc. S'holder Litig.*, C.A. No. 8272-VCG, 2013 WL 5631233, at *8 (Del. Ch. Oct. 16, 2013); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 980 (Del. Ch. 2005).

[402] *Blueblade Capital Opportunities LLC* v. *Norcraft Cos.,* C.A. No. 11184-VCS, 2018 WL 3602940, at *25 (Del. Ch. July 27, 2018).

[403] *Id.* at *22.

[404] Tr. of Telephonic Ruling of the Ct., *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, 2012 WL 9989211 (Del. Ch. Nov. 9, 2012); Tr. of Telephonic Oral Arg. and Ruling of the Ct., *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, 2012 WL 9989212 (Del. Ch. Nov. 27, 2012).

[405] Tr. of Telephonic Ruling of the Ct. at 16, *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, 2012 WL 9989211 (Del. Ch. Nov. 9, 2012).

[406] *In re Comverge, Inc. S'holders Litig.*, Consol. C.A. No. 7368-VCP, 2014 WL 6686570, at *15-17 (Del. Ch. Nov. 25, 2014).

[407] *Brown* v. *Authentec, Inc.*, Case No. 05-2012-CA-57589 (Fla. Cir. Ct. Sept. 18, 2012), *aff'd*, 109 So.3d 219 (Fla. Dist. Ct. App. 2013) (table).

[408] Tr. of Oral Arg. at 106, *In re NYSE Euronext S'holders Litig.*, C.A. 8136-CS (Del. Ch. May 10, 2013).

[409] *Akorn, Inc.* v. *Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018).

[410] *Akorn, Inc.* v. *Fresenius Kabi AG*, 198 A.3d 724 (Del. 2018).

[411] *Akorn*, 2018 WL 4719347, at *50.

[412] *Id*. at *1.

[413] *Id.* at *54-55.

[414] *Id*. at *2.

[415] *Id*. at *53 (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001) (footnote omitted)). In *Ameristar Casinos, Inc.* v. *Resorts International Holdings, LLC*, the Court accepted the premise, although did not decide, that an MAE had occurred where there was a 248% increase in the property tax assessment on the target asset, which translated to a tax liability of $18 million per year for an asset generating $30 million per year in net income. C.A. No. 3685-VCS, 2010 WL 1875631 (Del. Ch. May 11, 2010). In 2017, the Court of Chancery extended the heavy burden in finding an MAE from the acquisition context to a license agreement between Mrs. Fields and Interbake and applied the test from *IBP* in assessing whether the standard for termination had been achieved. *Mrs. Fields Brand, Inc*. v. *Interbake Foods LLC*, C.A. No. 12201-CB, 2017 WL 2729860 (Del. Ch. Jun 26, 2017). Notably, the license agreement did not use a defined MAE or MAC term and instead referred to a "change . . . that is . . . materially adverse to . . . the business," which the Court equated with a traditional MAE/MAC standard. *Id.* at *21-23. The Court even extended the *IBP* test to a termination right in the license agreement that did not use "material adverse" language but instead allowed for termination if the licensor materially damaged the brand in a way that "renders the performance of [the] Agreement by Licensee commercially unviable." *Id.* at *20. The Court found that despite no use of "material adverse" language, the magnitude and duration of a loss must meet MAE-like significance before a party could terminate. *Id.* at *25-27.

[416] *Akorn*, 2018 WL 4719347, at *53

[417] *Snow Phipps Group, LLC et al.* v. *KCAKE Acquisition, Inc., et al.,* C.A. No. 2020-0282-KSJM, 2021 WL 1714202 (Del. Ch. Apr. 30, 2021).

[418] *Akorn*, 2018 WL 4719347, at *60.

[419] *Channel Medsystems, Inc.* v. *Boston Sci. Corp.,* No. 2018-0673-AGB, 2019 WL 6896462 (Del. Ch. Dec. 18, 2019)

[420] *IBP Inc.*, 789 A.2d at 83.

[421] *Hexion Specialty Chems., Inc.* v. *Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).

[422] *Id.* at 738.

[423] *Id.* at 740.

[424] *Genesco, Inc.* v. *The Finish Line, Inc.*, No. 07-2137-II(III), 2007 WL 4698244 (Tenn. Ch. Dec. 27, 2007).

[425] *AB Stable VIII LLC* v. *Maps Hotels and Resorts One LLC et al.*, C.A. No. 2020-0310-JTL, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020).

[426] *Id.* at *56.

[427] *Akorn*, 2018 WL 4719347, at *49.

[428] *Id.* at *61.

[429] *AB Stable*, 2020 WL 7024949 at *70, 73.

[430] *Id.* at *73.

[431] *AB Stable VIII LLC* v. *MAPS Hotels and Resorts One LLC*, __ A.3d __, 2021 WL 5832875, at *10 (Del. Dec. 8, 2021).

[432] *United Rentals, Inc.* v. *RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007).

[433] *All. Data Sys. Corp.* v. *Blackstone Capital Partners V L.P.*, 963 A.2d 746 (Del. Ch.), *aff'd*, 976 A.2d 170 (Del. 2009) (table).

[434] *James Cable, LLC* v. *Millennium Dig. Media Sys., L.L.C.*, C.A. No. 3637-VCL, 2009 WL 1638634 (Del. Ch. June 11, 2009).

[435] *Id.* at *4.

[436] *Snow Phipps Group, LLC et al.* v. *KCAKE Acquisition, Inc., et al.*, C.A. No. 2020-0282-KSJM, 2021 WL 1714202 (Del. Ch. Apr. 30, 2021).

[437] A contractual obligation often imposed on parties is a reasonable best efforts standard whereby the parties covenant to undertake certain actions, often including obtaining consents and other regulatory approvals. This reasonable best efforts standard was interpreted in *Williams Cos.* v. *Energy Transfer Equity* to mean the party must "take all reasonable actions to complete the merger" and that the burden is on the alleged breaching party to prove it has not breached its covenant and failed to satisfy a closing condition. 159 A.3d 264, 273 (Del. 2017). In this case, the Delaware Supreme Court found that Energy Transfer Equity had not breached its covenant when its tax counsel did not deliver a tax opinion that was a required closing condition. *Id.* at 274.

[438] *Consol. Edison, Inc.* v. *Ne. Utils.*, 426 F.3d 524 (2d Cir. 2005).

[439] For a discussion of sample contract language, see Ryan Thomas & Russell Stair, *Revisiting Consolidated Edison—A Second Look at the Case That Has Many Questioning Traditional Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers*, 64 BUS. LAW. 329, 349-57 (2009). *Cf. Amirsaleh* v. *Bd. of Trade*,

C.A. No. 2822-CC, 2008 WL 4182998 (Del. Ch. Sept. 11, 2008) (holding that stockholder who received late election form had standing to sue for his preferred form of consideration after the merger was consummated).

[440] *Hexion Specialty Chems., Inc.* v. *Huntsman Corp.*, 965 A.2d 715, 748 (Del. Ch. 2008).

[441] *See Paramount Commc'ns, Inc.* v. *Time Inc. (Time-Warner)*, 571 A.2d 1140 (Del. 1990).

[442] *See* Tr. of Settlement Hearing, *In re Atmel Corp. S'holders Litig.*, C.A. No. 4161-CC, 2010 WL 9044679 (Del. Ch. Jan. 7, 2010).

[443] *Versata Enters., Inc.* v. *Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

[444] *See, e.g.*, *Moran* v. *Household Int'l, Inc.*, 500 A.2d 1346, 1346 (Del. 1985); *Leonard Loventhal Account* v. *Hilton Hotels Corp.*, C.A. No. 17803, 2000 WL 1528909 (Del. Ch. Oct. 10, 2000), *aff'd*, 780 A.2d 245 (Del. 2001).

[445] *See Hollinger Int'l, Inc.* v. *Black*, 844 A.2d 1022, 1085-88 (Del. Ch. 2004) (upholding the adoption of a rights plan in the context of a company's ongoing process of exploring strategic alternatives, where the court found that the controlling shareholder seeking to sell its control bloc had breached fiduciary duties and contractual obligations to the company, such that the normal power of a majority shareholder to sell its stock without sharing the opportunity with minority holders could not be used to further these breaches).

[446] *See Desert Partners, L.P.* v. *USG Corp*., 686 F. Supp. 1289 (N.D. Ill. 1988); *BNS Inc.* v. *Koppers Co*., 683 F. Supp. 458, 474-75 (D. Del. 1988); *Moore Corp.* v. *Wallace Comput. Servs. Inc.*, 907 F. Supp. 1545 (D. Del. 1995); *Air Prods. & Chems., Inc.* v. *Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011).

[447] *CRTF Corp.* v. *Federated Dep't Stores, Inc.*, 683 F. Supp. 422, 438-42 (S.D.N.Y. 1988) (refusing to enjoin discriminatory application of rights plan during auction); *MAI Basic Four, Inc.* v. *Prime Comput., Inc.*, C.A. No. 10428, 1988 WL 140221 (Del. Ch. Dec. 20, 1988); *In re Holly Farms Corp. S'holders Litig.*, C.A. No. 10350, 1988 WL 143010 (Del. Ch. Dec. 30, 1988).

[448] *Airgas*, 16 A.3d 48.

[449] *Yucaipa Am. All. Fund II, L.P.* v. *Riggio*, 1 A.3d 310 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011); *see also In re BioClinica, Inc. S'holder Litig.*, C.A. 8272-VCG, 2013 WL 673736 (Del. Ch. Feb. 25, 2013).

[450] *Yucaipa*, 1 A.3d at 350.

[451] *In re Versum Materials, Inc. Stockholder Litig.*, Consolidated C.A. No. 2019-0206-JTL (Del. Ch. July 16, 2020).

[452] *Third Point LLC* v. *Ruprecht*, C.A. Nos. 9496-VCP, 9497-VCP, 9508-VCP, 2014 WL 1922029, at *17, *22 (Del. Ch. May 2, 2014).

[453] *Versata Enters., Inc.* v. *Selectica, Inc.*, 5 A.3d 586, 586 (Del. 2010).

[454] *The Williams Companies Stockholder Litigation*, C.A. No. 2020-0707-KSJM at *76 (Del. Ch. Feb. 26, 2021).

[455] *Id*. at *2.

[456] *Id*. at *54.

[457] In the case of *Quickturn Design Systems, Inc.* v. *Shapiro*, the Delaware Supreme Court ruled that dead hand and no hand provisions—even of limited duration—are invalid. *See Quickturn Design Sys., Inc.* v. *Shapiro*, 721 A.2d 1281 (Del. 1998). The Court held that the dead hand feature of the rights plan, which barred a newly elected board from redeeming the pill for six months, ran afoul of Section 141(a) of the DGCL, which empowers the board with the statutory authority to manage the corporation. The Court also criticized dead hand provisions because they would prevent a newly elected board "from completely discharging its fundamental management duties to the corporation and its stockholders for six months" by restricting the board's power to negotiate a sale of the corporation. *Id.* at 1291 (emphasis omitted). The reasoning behind the *Quickturn* holding, together with that of the 1998 decision in *Carmody* v. *Toll Brothers, Inc.* (which dealt with a pure dead hand pill rather than a no hand pill), leaves little room for dead hand provisions of any type in Delaware. *Carmody* v. *Toll Bros.*, 723 A.2d 1180 (Del. Ch. 1998). In contrast to Delaware, courts in both Georgia and Pennsylvania have upheld the validity of dead hand and no hand provisions. *See Invacare Corp.* v. *Healthdyne Techs. Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997); *AMP Inc.* v. *Allied Signal, Inc.*, C.A. Nos. 98-4405, 98-4058, 98-4109, 1998 WL 778348 (E.D. Pa. Oct. 8, 1998), *partial summary judgment granted*, 1998 WL 967579 (E.D. Pa. Nov. 18, 1998), *rev'd and remanded*, 168 F.3d 649 (3d Cir. 1999).

[458] *Airgas, Inc.* v. *Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1185 (Del. 2010).

[459] *See* DEL. CODE ANN. tit. 8, § 141(k)(1).

[460] *Icahn Partners LP* v. *Amylin Pharm., Inc.*, No. 7404-VCN, 2012 WL 1526814 (Del. Ch. Apr. 20, 2012).

[461] *AB Value Partners, LP* v. *Kreisler Mfg. Corp.*, No. 10434-VCP, 2014 WL 7150465, at *5 (Del. Ch. Dec. 16, 2014). In 2018, a New York trial court applying New York law enjoined Xerox's Board from enforcing the company's advance notice bylaw provision where the company announced a strategic transaction following the notice date, reasoning that a waiver of the notice provision was warranted because Xerox had undergone "a material change in circumstances" after the deadline. *In re Xerox Corp. Consol. S'holder Litig.*, 76 N.Y.S.3d 759 (Sup. Ct. 2018), *rev'd on other grounds sub nom. Deason* v. *Fujifilm Holdings Corp.*, 86 N.Y.S.3d 28 (1st Dep't 2018).

[462] *BlackRock Credit Allocation Income Tr.* v. *Saba Capital Master Fund, Ltd.*, 2224 A.3d 964, 980 (Del. 2020).

[463] *Rosenbaum* v. *CytoDyn Inc.*, C.A. No. 2021-0728-JRS (Del. Ch. Oct. 13, 2021).

[464] *See* DEL. CODE ANN. tit. 8, § 211(d).

[465] *Id.* § 211(c).

[466] *See Licht* v. *Storage Tech. Corp.*, C.A. No. 524-N, 2005 WL 1252355 (Del. Ch. May 13, 2005) (holding that, as a default matter, when the shareholders of a corporation vote on matters other than the election of directors (and barring the application of a more specific voting standard under another Delaware statute), abstentions are properly counted as negative votes).

[467] *See, e.g.*, *Allen* v. *Prime Comput., Inc.*, 540 A.2d 417 (Del. 1988); *Edelman* v. *Authorized Distribution Network, Inc.*, C.A. No. 11104, 1989 WL 133625 (Del. Ch. Nov. 3, 1989); *Nomad Acquisition Corp.* v. *Damon Corp.*, C.A. Nos. 10173, 10189, 1988 WL 383667 (Del. Ch. Sept. 20, 1988).

[468] *See, e.g.*, *Allen*, 540 A.2d 417; *Edelman*, 1989 WL 133625; *Nomad Acquisition Corp.*, 1988 WL 383667; *Plaza Sec. Co.* v. *O'Kelley*, C.A. No. 7932, 1985 WL 11539 (Del. Ch. Mar. 5, 1985), *aff'd sub nom*, *Datapoint Corp.* v. *Plaza Sec. Co.*, 496 A.2d 1031 (Del. 1985).

[469] *Blasius Indus., Inc.* v. *Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

[470] *See, e.g.*, *Kidsco Inc.* v. *Dinsmore*, 674 A.2d 483 (Del. Ch.), *aff'd*, 670 A.2d 1338 (Del. 1995); *Stahl* v. *Apple Bancorp, Inc.*, C.A. No. 11510, 1990 WL 114222 (Del. Ch. Aug. 9, 1990).

[471] *Pell* v. *Kill*, 2016 WL 2986496 (Del. Ch. May 19, 2016).

[472] *Boilermakers Local 154 Ret. Fund* v. *Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

[473] *Id.* at 950.

[474] *Id.* at 953 (referring to *Moran* v. *Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985)).

[475] DEL. CODE ANN. tit. 8, § 115.

[476] *City of Providence* v. *First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014).

[477] *E.g.*, *In re CytRX Corp. Stockholder Derivative Litig.*, No. CV-14-6414, 2015 WL 9871275 (C.D. Cal. Oct. 30, 2015); Order, *Brewerton* v. *Oplink Commc'ns, Inc.*, No. RG14-750111, 2014 WL 10920491 (Cal. Super. Ct. Dec. 12, 2014); Order, *Groen* v. *Safeway, Inc.*, No. RG14-716651, 2014 WL 3405752 (Cal. Super. Ct. May 14, 2014); Order, *Miller* v. *Beam, Inc.*, No. 2014 CH 00932, 2014 WL 2727089 (Ill. Ch. Ct. Mar. 5, 2014); Order, *Genoud* v. *Edgen Grp., Inc.*, No. 625,244, 2014 WL 2782221 (La. Dist. Ct. Jan. 17, 2014); Order, *Collins* v. *Santoro*, No. 154140/2014, 2014 WL 5872604 (N.Y. Sup. Ct. Nov. 10, 2014); Order, *HEMG Inc.* v. *Aspen Univ.*, C.A. No. 650457/13, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 14, 2013); *North* v. *McNamara*, 47 F. Supp. 3d 635 (S.D. Ohio 2014); *Roberts* v. *TriQuint Semiconductor, Inc.*, 358 Or. 413, 415 (2015) (en banc); *see also City of Providence* v. *First Citizens BancShares*, 99 A.3d 229 (Del. Ch. 2014) (enforcing a North Carolina forum-selection bylaw).

[478] Order, *Centene Corp.* v. *Elstein*, C.A. No. 11589-VCL, 2015 WL 5897988 (Del. Ch. Oct. 8, 2015); Telephonic Hr'g on Pl.'s Mot. For Expedited Proceedings & for TRO & Rulings of the Ct., *Edgen Grp. Inc.* v. *Genoud*, C.A. No. 9055-VCL, 2013 WL 6409517 (Del. Ch. Nov. 5, 2013).

[479] *Rosenbaum v. CytoDyn Inc.*, C.A. No. 2021-0728-JRS (Del. Ch. Oct. 13, 2021).

[480] *Salzberg* v. *Sciabacucchi*, 227 A.3d 102 (Del. 2020).

[481] *ATP Tour, Inc.* v. *Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

[482] *Id.* at 558.

[483] DEL. CODE ANN. tit. 8, § 102(f); DEL. CODE ANN. tit. 8, § 109(b).

[484] *Solak* v. *Sarowitz*, C.A. No. 12299-CB, 2016 WL 7468070 (Del. Ch. Dec. 27, 2016).

[485] *See, e.g.*, *Moore Corp.* v. *Wallace Comput. Servs. Inc.*, 907 F. Supp. 1545 (D. Del. 1995); *Buckhorn, Inc.* v. *Ropak Corp.*, 656 F. Supp. 209 (S.D. Ohio 1987), *aff'd*, 815 F.2d 76 (6th Cir. 1987).

[486] *See, e.g.*, *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom. Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000); *Grimes* v. *Donald*, 673 A.2d 1207 (Del. 1996); *Worth* v. *Huntington Bancshares, Inc.*, 540 N.E.2d 249 (Ohio 1989).

[487] *San Antonio Fire & Police Pension Fund* v. *Amylin Pharm., Inc.*, 983 A.2d 304 (Del. Ch. 2009), *aff'd*, 981 A.2d 1173 (Del. 2009).

[488] *Id.* at 315.

[489] *Id.* at 316 n.37.

[490] *Kallick* v. *SandRidge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013).

[491] *Id.* at 260.

[492] *Id.* at 255-60.

[493] *Id.* at 264.

[494] Tr. of Oral Arg. on Defs.' Mots. to Dismiss and Rulings of the Ct. at 70, *Pontiac Gen. Emps. Ret. Sys.* v. *Ballantine*, No. 9789-VCL, 2014 WL 6388645 (Del. Ch. Oct. 14, 2014).

[495] *Id*. at 13-15.

[496] *Id*. at 72-73.

[497] *Id*. at 74; *see Carmody* v. *Toll Bros.*, 723 A.2d 1180 (Del. Ch. 1998).

[498] Tr. of Oral Arg. on Defs.' Mots. to Dismiss and Rulings of the Ct. at 78-79, *Pontiac,* 2014 WL 6388645.

[499] *See, e.g.*, *Arnaud van der Gracht de Rommerswael* v. *Speese*, No. 4:17-cv-227, 2017 WL 4545929 (E.D. Tex. Oct. 10, 2017) (denying motion to dismiss breach of fiduciary duty claims against directors who approved a proxy put provision where the complaint alleged that the board (a) did not obtain extra consideration from lenders for including the provision, (b) could have obtained the financing without the provision, and (c) should have known the provision's risks); *Gilbert* v. *Abercrombie & Fitch, Co.*, No. 2:15-cv-2854, 2016 WL 4159682 (S.D. Ohio Aug. 5, 2016) (settlement of breach of fiduciary duty claims against directors who had approved dead hand proxy puts included (a) removal of the proxy put provisions, (b) a $167,000 payment to class counsel but no payment to the class, and (c) resolutions requiring board approval for any future debt instruments that contain dead hand proxy puts).

[500] Tr. of Telephonic Bench Ruling of the Ct. on Pl.'s Application for an Order to Dismiss the Action as Moot and for an Award of Attorneys' Fees and Expenses at 8, *Fire & Police Pension Fund, San Antonio* v. *Stanzione*, C.A. No. 10078-VCG, 2015 WL 1359410 (Del. Ch. Feb. 25, 2015).

[501] *See* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21(c) of the Securities Exchange Act of 1934: In the Matter of WACAS Management Corporation, Release No. 89914 (Sept. 7, 2020), *available at* https://www.sec.gov/enforce/34-89914-s; Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21(c) of the Securities Exchange Act of 1934: In the Matter of FP Resources USA Inc. and Lobster Point Holdings Limited, Release No. 83626 (July 13, 2018), *available at* https://www.sec.gov/litigation/admin/2018/34-83626.pdf; and SEC *Release 2015-47, available at https://www.sec.gov/news/pressrelease/2015-47.html* (March 13, 2015).

[502] *Basic Inc.* v. *Levinson*, 485 U.S. 224, 239 (1988); *see also TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 439 (1976) (setting forth the basic test for materiality under the securities laws).

[503] *Basic*, 485 U.S. at 239-41.

[504] Targets only must disclose a potential transaction if (i) such disclosure is affirmatively required by SEC rules, (ii) the target or a corporate insider desires to trade on the basis of material non-public information (the "disclose or abstain rule"), or (iii) disclosure is required to make prior statements not misleading. *Vladimir* v. *Bioenvision Inc.*, 606 F. Supp. 2d 473, 484-85 (S.D.N.Y. 2009), *aff'd Thesling* v. *Bioenvision, Inc.*, 374 Fed. App. 141 (2d Cir. 2010); *SEC* v. *Tex. Gulf Sulphur*, 401 F.2d 833, 848 (2d Cir. 1968); *see also* Exchange Act Rule 14e-3 (prohibiting trading in the context of tender offers on the basis of material non-public information). Disclosure is only required by SEC rules in limited situations and Item 1.01 of Form 8-K does not require disclosure of mergers until a formal agreement is signed. Further, the SEC staff takes the position that although Item 303 of Regulation S-K could be read to require companies to address pending talks as "likely to have material effects on future financial condition or results of operations," where disclosure is not otherwise required, a company's management's discussion and analysis need not contain a discussion of the impact of negotiations where inclusion of such information would jeopardize the completion of the transaction. Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, SEC Release No. 33-6835 (May 18, 1989); 17 C.F.R. § 229.303.

[505] "The duty of a corporation and its officers to disclose is limited. To that end, 'a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts.'"

Vladimir, 606 F. Supp. 2d at 484 (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)); *see also Basic*, 485 U.S. at 239 n.17.

[506] *Emps. Ret. Sys. of R.I.* v. *Williams Cos.*, 889 F.3rd 1153, 1168 (10th Cir. 2018).

[507] However, the NYSE takes the position that "[n]egotiations leading to mergers and acquisitions . . . are the type of developments where the risk of untimely and inadvertent disclosure of corporate plans are most likely to occur. . . . If unusual market activity should arise, the company should be prepared to make an immediate public announcement of the matter. . . . A sound corporate disclosure policy is essential to the maintenance of a fair and orderly securities market. It should minimize the occasions where the [NYSE] finds it necessary to temporarily halt trading in a security due to information leaks or rumors in connection with significant corporate transactions." *NYSE Listed Company Manual,* Rule 202.01. Similarly, Nasdaq imposes a duty on listed companies to promptly disclose, except in unusual circumstances, any material information which would reasonably be expected to affect the value of their securities or influence investors' decisions. *Nasdaq Stock Market Rules,* Rule 5250(b)(1). Nasdaq defines unusual circumstances as, among other things, "where it is possible to maintain confidentiality of those events and immediate public disclosure would prejudice the ability of the Company to pursue its legitimate corporate objectives." *Nasdaq Stock Market Rules,* Rule IM 5250-1.

[508] *See, e.g.*, *In re MCI Worldcom, Inc. Sec. Litig.*, 93 F. Supp. 2d 276, 280 (E.D.N.Y. 2000) (concluding that a disclosure duty arose only after the company affirmatively denied merger negotiations); *In re Columbia Sec. Litig.*, 747 F. Supp. 237, 243 (S.D.N.Y. 1990) (concluding that the plaintiff sufficiently pled that affirmative denial of merger negotiations during ongoing merger negotiations was materially misleading).

[509] *In the Matter of Carnation Co.*, SEC Release No. 34-22214 (July 8, 1985).

[510] *Eisenstadt* v. *Centel Corp.*, 113 F.3d 738, 744 (7th Cir. 1997) ("Obviously a corporation has no duty to correct rumors planted by third parties."); *Carnation Co.*, SEC Release No. 34-22214. Additionally, there may be a duty to make corrective disclosure where there is evidence that market rumors stem from trading by insiders in the company's shares. *In re Sharon Steel Corp.*, SEC Release No. 34-18271 (Nov. 19, 1981).

[511] *State Teachers Ret. Bd.* v. *Fluor*, 654 F.2d 843, 850 (2d Cir. 1981); *see also Eisenstadt*, 113 F.3d at 744; *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 265 (2d Cir. 1993); *Holstein* v. *Armstrong*, 751 F. Supp. 746, 747 (N.D. Ill. 1990).

[512] The test of whether a leak or rumor is attributable to an issuer mirrors the test for whether a company is liable for analyst statements and forecasts—that is, whether the

company has "sufficiently entangled" itself with the disclosure of information giving rise to the rumor. "Sufficient entanglement" can occur either explicitly by leaking information or implicitly if the company reviews information and represents that it is accurate or comports with the company's views. *Elkind* v. *Liggett & Myers, Inc.*, 635 F.2d 156, 162-63 (2d Cir. 1980).

[513] *Fluor*, 654 F.2d 843.

[514] *Id.* at 846-49.

[515] *Id.* at 851.

[516] For example, Nasdaq notes that "Whenever unusual market activity takes place in a Nasdaq Company's securities, the Company normally should determine whether there is material information or news which should be disclosed. If rumors or unusual market activity indicate that information on impending developments has become known to the investing public, or if information from a source other than the Company becomes known to the investing public, a clear public announcement may be required as to the state of negotiations or development of Company plans. Such an announcement may be required, even though the Company may not have previously been advised of such information or the matter has not yet been presented to the Company's Board of Directors for consideration. In certain circumstances, it may also be appropriate to publicly deny false or inaccurate rumors, which are likely to have, or have had, an effect on the trading in its securities or would likely have an influence on investment decisions." *Nasdaq Stock Market Rule*, Rule IM 5250-1. *See also supra* note 479.

[517] *Moore Corp.* v. *Wallace Comput. Servs. Inc.*, 907 F. Supp. 1545, 1558, 1560 (D. Del. 1995).

[518] *Air Prods. & Chems., Inc.* v. *Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011).

[519] *See Allergan, Inc.* v. *Valeant Pharm. Int'l, Inc.*, No. SACV 14–1214 DOC(ANx), 2014 WL 5604539 (C.D. Cal. Nov. 4, 2014).

[520] The technique of a white squire defense combined with a self-tender offer at market or a slight premium to market was used defensively by Diamond Shamrock and Phillips-Van Heusen in 1987. In neither of those instances, however, did the would-be acquiror challenge the defense. In 1989, the Delaware Court of Chancery upheld the issuance of convertible preferred stock by Polaroid Corporation to Corporate Partners in the face of an all-cash, all-shares tender offer, marks the most significant legal test of the white squire defense. *See Shamrock Holdings, Inc.* v. *Polaroid Corp.*, 559 A.2d 278 (Del. Ch. 1989). The Polaroid decision confirmed the prevailing line of cases upholding the issuance of stock to a white squire as a defensive measure when the result was not to consolidate voting control in management or employee hands.

[521] *See* 17 CFR § 240.14d-101, Item 7 of Schedule 14D (calling for disclosure pursuant to, among other items, Item 1006(d)).

[522] *Moran* v. *Household Int'l, Inc.*, 500 A.2d 1346, 1350 n.6 (Del. 1985).

[523] *In re AbbVie Stockholder Derivative Litig.*, Cons. C.A. No. 9983-VCG, 2015 WL 4464505 (Del. Ch. July 21, 2015).

[524] Order, *Depomed Inc.* v. *Horizon Pharma, PLC*, No. 1-15-CV-283834, 2015 WL 7433326 (Cal. Super. Ct. Nov. 19, 2015).

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[526] *Id.*

[527] John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018).

[528] *See* Wachtell, Lipton, Rosen & Katz, Comment Letter to SEC (July 24, 2008), *available at* http://www.sec.gov/comments/s7-10-08/s71008-28.pdf (commenting that the SEC's proposed revisions, which ultimately were adopted substantially as proposed with a few notable exceptions, should be revised to enact comprehensive reform, such as using U.S. trading volume—and not beneficial ownership—as the relevant criterion for determining the level of exemption; providing Tier I-style exemptive relief to Section 13(d) regulation under the Williams Act; and eliminating the use of "unconventional tender offer" analysis in foreign transactions).