MERGERS & ACQUISITIONS XI: PUBLIC M&A: DEAL POINTS

March 2023

I. Executive Summary

This is the eleventh in the series of advisories we started last year on Mergers & Acquisitions ("M&A"). Its predecessors in the series: Mergers & Acquisitions I: Overview and Transaction Types ("M&A I"); Mergers & Acquisitions II: Tax Structuring Considerations ("M&A II"); Mergers & Acquisitions III: Acquisition Consideration ("M&A III"); Mergers & Acquisitions IV: Preliminary Documentation ("M&A IV"); Mergers & Acquisitions V: Stock Purchase Transactions ("M&A V"); Mergers & Acquisitions VI: Asset Purchase Transactions ("M&A VI"); Mergers & Acquisitions VII: Mergers ("M&A VII"); Mergers & Acquisitions VIII: Antitrust Merger Control & Clearance ("M&A VIII"); Mergers & Acquisitions IX: Intellectual Property Issues ("M&A IX"); and Mergers & Acquisitions X: Financing M&A ("M&A X") are available at the preceding links, along with other M&A resources on our website at Kurtin PLLC Mergers & Acquisitions and on Lexology.com at the Kurtin PLLC Lexology Hub.

This advisory will focus on Public M&A, in which Target is a public reporting company under the Exchange Act. Future editions will focus on issues like Acquiror's and Target's corporate governance and fiduciary duties in an M&A transaction; Cross-border M&A, in which one of Acquiror and Target is a U.S. company and the other company is domiciled in another country; employment and equity-based compensation, like stock options; due diligence; divestitures, spin-offs, leveraged buyouts and "going private" transactions, in which a public reporting company Target is acquired by a Acquiror and becomes a private company in the process (leveraged buy-outs by private equity firms and management buy-outs are paradigms); M&A involving acquisition of distressed assets or bankruptcy; industry-specific regulatory issues; foreign investment controls; technology export controls; and others.

In this and all future editions of this M&A series, familiarity with the preceding editions linked above will be assumed and previously defined terms will be used without further introduction; however, we will continue to attach and update the Appendix 1 Glossary of all defined terms introduced to date. Following the discussion are "Deal Points" on important considerations in the purchase or sale of a business: what to do, and *what at all costs not to do*.

II. Public M&A Transaction Structures, Corporate, Tax, Securities and Antitrust Issues

A. Overview

Public M&A almost always proceeds by either a one-step Merger, or a two-step transaction, in which a "Tender Offer" by Acquiror, a highly regulated procedure pursuant to the Exchange Act and SEC regulations, is made to buy Target shares held by the public for cash, followed by a Merger to acquire Target shares not tendered (a Tender Offer for Target's public float stock in in whole or in part in Acquiror stock instead of cash is an "Exchange Offer").

Mergers (meaning for our purposes "Statutory Mergers") are not only private contracts between legal entities like Stock Purchase and Asset Purchase transactions; Mergers as a transaction structure exist only pursuant to state merger statutes contained in their corporate laws. To effect a legally binding Statutory Merger, the parties have to comply with the merger statutes of the states in which both Acquiror and Target are domiciled. For purposes of this discussion, we'll again assume that both Acquiror and Target are Delaware corporations and that their Merger will be effected pursuant to DGCL §251 or §253, but one or both can be domiciled in other states, or other countries; DGCL §252 governs Mergers between Delaware and "foreign" (non-Delaware) corporations. We'll also assume that Acquiror and Target are engaged in a negotiated M&A transaction, not a hostile takeover.

In many ways, Public M&A is less creative and customized than M&A involving private company Targets. In a Merger, through one of the transaction structures discussed and diagrammed below, Acquiror must assume all of Target's assets and liabilities, either directly or through a Merger Sub, and either Acquiror, Target or Merger Sub is the Surviving Entity, while the merged party ceases to exist. Many of the features of private company M&A we have discussed in prior M&A: Deal Points editions, such as acquisition of a majority but not all of Target's equity (resulting in post-closing relationship in which Acquiror and Target shareholders are respectively Target's majority and minority owners, and must allocate their rights and responsibilities in that relationship), contingent Acquisition Consideration, included and excluded assets, representations and warranties surviving closing and post-closing indemnification rights and covenants, do not apply in Public M&A.

B. Mergers as Part of One-Step ("Long Form") Public M&A Transactions

Execution of a Long Form Merger pursuant to DGCL §251 requires several steps. Section 251 requires, broadly, that the board of directors of each merging corporation must adopt a resolution approving a Merger Agreement. The Merger Agreement must set forth the terms and conditions of the Merger, mode of putting the Merger into effect, changes to be made in the Surviving Entity's certificate of incorporation, the manner of conversion of shares of the merging companies into the Surviving Entity's shares, and other provisions desired by the merging parties. The Merger Agreement must then be submitted to each merging company's stockholders at an annual or special meeting for their approval, usually through a proxy statement pursuant to Exchange Act Regulation 14A (see Section F, below). The Merger Agreement and the amended/amended and restated certificate of incorporation of the Surviving Entity or a certificate of merger is filed with the Delaware Secretary of State, and the Merger is complete.

Mergers are stock-for-stock transactions, generally structured as either Fixed Exchange Ratio transactions, in which the number of Target shares to be exchanged for Acquiror shares is fixed and the dollar value of the Merger Consideration (as opposed to Acquisition Consideration) - Acquiror's stock - can rise or fall prior to closing (Fixed Exchange Ratio transactions are usually used in larger "mergers of equals" transactions, as well as transactions in sectors of perceived volatility, since both parties share the risk of movement in Acquiror's share price); or Fixed Value Ratio transactions, in which the dollar value of the Merger Consideration is fixed based on measurement during a negotiated period or an agreed-upon valuation as of a certain date, but the number of shares to be exchanged for Target's stock can rise or fall prior to closing, placing the risk of movement in Acquiror's share value or price squarely with Acquiror, since Target/Target shareholders are assured of the same dollar value Merger Consideration (Fixed Value Ratio transactions are more common when one company is clearly the Acquiror and the other company is clearly the Target (see M&A III, Section III(a)).

C. Tax Issues

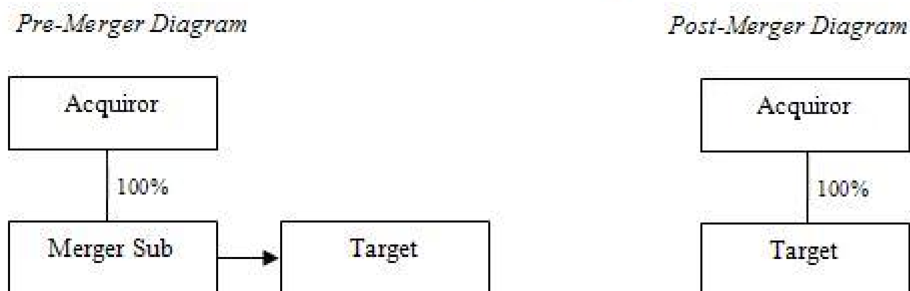
Public M&A transactions are usually structured as Direct Mergers, Reverse Triangular Mergers, or Forward Triangular Mergers. When properly executed, a Statutory Merger, including the Direct Merger, Reverse Triangular Merger and Forward Triangular Merger structures diagrammed here, qualifies for tax-free treatment pursuant to Tax Code §368(a)(1)(A) (see M&A II).

Direct Merger. In a direct merger, the Target merges into Acquiror. The Target ceases to exist, and the Acquiror is the Surviving Entity, succeeding to the Target's assets and liabilities.

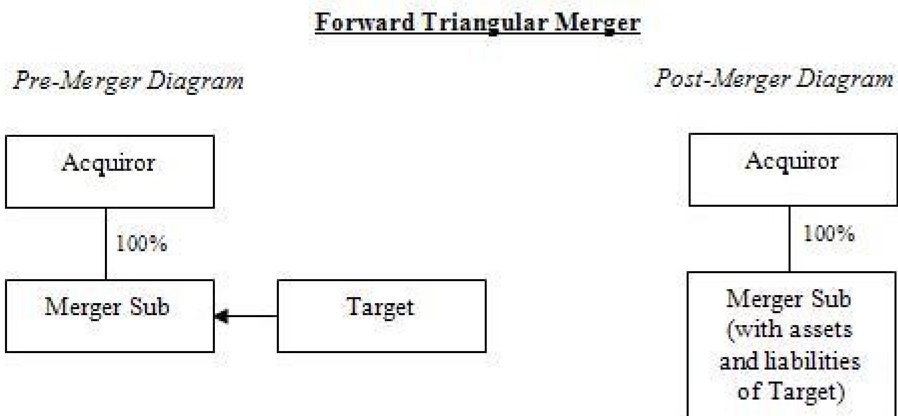
Direct Merger

Reverse Triangular Merger. In a Reverse Triangular Merger, Acquiror forms a new Delaware subsidiary shell corporation, usually cunningly named Merger Sub, and Merger Sub merges into Target, rather than Target merging into Acquiror (that's what makes it a "reverse" Merger, and the presence of Merger Sub in the transaction is what makes it a "triangular Merger," since there are three parties). In the result, Merger Sub ceases to exist, because it has been merged into Target, and post-transaction, Acquiror is the parent of Target, now Acquiror's wholly-owned subsidiary. That's an important takeaway; compared to the Direct Merger paradigm, in which Target ceases to exist, in a Reverse Triangular Merger, Target continues its corporate existence and business life, but as Acquiror's wholly-owned subsidiary. The Reverse Triangular Merger structure is particularly valuable when a material deal consideration is that Target continue to exist, which may avoid the need for third party consents to assignment of contracts (of course, change of control provisions in third party contracts may still be activated by a Reverse Triangular Merger.

Reverse Triangular Merger



Forward Triangular Merger. In a Forward Triangular Merger, Acquiror again forms Merger Sub and Target merges into Merger Sub, rather than Merger Sub merging into Target. Merger Sub is the Surviving Entity, while Target ceases to exist. Merger Sub is then renamed.



D. Antitrust and Other Regulatory Issues

In most cases, Public M&A transactions will trip the annually revised Hart-Scott-Rodino antitrust pre-clearance notification threshold requirements, requiring the Merger parties to notify the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DoJ"), and await the expiration of a mandatory waiting period (30 days generally, 15 days in the case of a cash Tender Offer) prior to the closing. (see M&A VIII).

E. Tender Offers as Part of Two-Step ("Short Form") Public M&A Transactions

The Tender Offer process is specifically provided for by DGCL §251(h) and regulated pursuant to Exchange Act §14(d). Section 251(h) eliminates the need for a shareholder vote required by §251 generally if Target has a class or series of stock is listed on a national securities exchange or has more than 2,000 stockholders of record, provided that the Merger Agreement provides for the Merger closing without a stockholder vote as soon as practicable after conclusion of the Tender Offer. Section 251(h) also provides that the Merger Agreement may set the minimum number or percentage of Target shares to be tendered. Beyond section 251(h), the terms and conditions of Tender Offers are strictly regulated

by the Exchange Act and regulations promulgated by the SEC pursuant to the Exchange Act, reviewed in Section F, below.

Tender Offers as part of a two-step transaction are often favored by the parties as a quick way to complete a Merger, compared to issuing a proxy statement pursuant to Regulation 14A (see below). Tender Offers are usually open for 20 days, although they may be extended and must be if the terms of the offer change. DGCL §251(h) requires the acquisition of at least the majority of Target shares to avoid a shareholder vote. However, if the Tender Offer results in Acquiror acquiring at least 90% of Target's equity, the transaction can be closed with a Short Form Merger pursuant to DGCL §253 as the second step.

By their nature, Tender Offers (unless an Exchange Offer) are cash transactions with each Target shareholder, usually at a premium to Target's market price, making them attractive to most shareholders. Tender Offers ordinarily do not require Target board approval, since they are directed at Target shareholders. For that reason, Tender Offers are also used in hostile takeovers. As noted, Tender Offers have a mandatory waiting period of only 15 days under HSR, so antitrust pre-merger clearance review is also usually shorter than for a one-step Merger.

F. Principal Securities Laws and Regulations Applicable to Public M&A

Regulation 14A. Regulation 14A requires the filing and distribution to Target shareholders of a proxy statement on Schedule 14A for transactions in which shareholder approval is required, including one-step Mergers. Reg. 14A also governs the solicitation of proxies. The proxy statement is a detailed information statement for Target shareholders to decide how to vote on the proposed transaction, including items detailing the securities for which proxies are solicited, directors and officers information, proxy voting procedures and revocability, information on the M&A transaction, financial information and others. If the proxy statement issuer does not require shareholder approval and proxies are not being solicited, it must file an information statement pursuant to Regulation 14C that contains similar information to the proxy statement.

Regulation 14D. Regulation D prescribes some Tender Offer modalities when the Tender Offer is made by an affiliate of the Target or a third party, such as Acquiror. Among Regulation D's requirements is that the Tender Offer be commenced by filing and distributing to Target shareholders Schedule TO, the

Tender Offer statement, containing detailed information about Target, the terms and purposes of the transaction, financial statements and other information, publishing an advertisement about the Tender Offer and mailing the Tender Offer materials themselves to Target shareholders. If the third party (like Acquiror) uses third parties solicitations or recommendations, it must file Schedule 14D-9, disclosing those third parties and their relationship to the party other than Target making the Tender Offer. Rule 14d-10 provides for equal treatment of all Target shareholders in a Tender Offer. All Target shareholders must receive the same consideration for their shares, including shareholders who tendered their shares before the price was raised during the pendency of the Tender Offer. Rule 13e-4 governs Tender Offers by Target for its own securities.

Regulation 14E. Regulation 14E governs terms and conditions of all Tender Offers, whether by Target, Acquiror or another party. Among Regulation 14E's requirements are that Tender Offers remain outstanding for 20 business days, subject to extension for 10 days if there is a change in the consideration offered or if the percentage of the securities being solicited changes; that payment for securities tendered must be promptly paid for; and that Target must publish or send to its own shareholders notice of its own recommendation as to their acceptance or rejection of the Tender Offer within 10 days of the Tender Offer beginning.

Williams Act. The Williams Act is an amendment to the Exchange Act that requires Acquiror or any investor acquiring more than 5% of Target's stock to file Schedule 13D with the SEC within 10 days of exceeding the 5% threshold (the SEC has proposed amendments to shorten the period to 5 days). Schedule 13D provides information on the investor, the investor's intentions in making the investment, and how the investment is being financed (source of funds). The 13D information can reveal, for example, if the stock purchase is being made as a Tender Offer prelude to a negotiated acquisition of the Target, a "toehold" investment prior to a planned hostile takeover, or by an activist shareholder seeking greater management control. A Schedule 13D filing therefore conveys valuable information to the Target's board, other shareholders and other market participants, such as other potential acquirors, supposedly in time to respond to market movements, mount a takeover defense or take other action. If the investor does not intend a takeover, it can instead file Schedule 13G within 10 days of acquiring between 5 and 20% of the Target's stock (above 20%, investor must file Schedule 13D even if no takeover is planned).

III. Deal Points

Deal Point No. 1: Tender Offers may be quicker, but are more susceptible to third party interference.

Solicitation of public float shares in a Tender Offer opens the door to competing bidders. If speed is not a premium and third party interference is feared, a one-step Merger with proxy solicitation of Target shareholders may be more secure.

Deal Point No. 2: In public M&A, the lack of post-closing deal protection puts a premium on due diligence.

Due diligence is important in all M&A transactions, but the lack of post-closing deal protections like indemnifications, earn-outs and covenants in Public M&A puts a premium on due diligence pre-closing.

Deal Point No. 3: Think about the deal signing to closing period when designing Merger Consideration.

All Public M&A deals are publicly announced in Form 8-K filings and press releases, and are therefore subject to market reaction. Merger Consideration parameters like Fixed Exchange Ratios vs. Fixed Value Ratios and protections like Collars, Caps and Floors should be heavily negotiated with the possibility and probability of pre-closing Merger Consideration movements in mind.

Owen D. Kurtin

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Mergers & Acquisitions: Deal Points
Cumulative Glossary
Appendix 1

1. **Acquiror (or Acquirer, Buyer or Purchaser):** the purchaser, or "buy side" party in an M&A transaction, whether an Asset Purchase or a Stock Purchase, which acquires all or the majority of the stock or assets of another business. In a Merger, the parties are not technically purchaser or seller, but when one party is clearly the dominant party in the transaction, and is often the Surviving Entity (though not always, as in the case of a Reverse Merger), that party can be thought of as the Acquiror.

2. **Acquisition Consideration:** the purchase price paid by Acquiror to Target in an M&A transaction, whether in cash, stock, assumed debt or a combination thereof.

3. **Asset Purchase:** a transaction by which one party to an M&A transaction purchases all or the majority of the assets of another party. Distinguished from a sale by Target in the ordinary course of business, as in selling a part of its inventory, or surplus equipment not needed for continuing its business operations.

4. **Asset Purchase Agreement:** a contractual agreement serving as the principal document by which an Asset purchase is effected.

5. **Cash Election Merger:** an M&A transaction in which Target shareholders are granted an election period to decide whether to accept stock or cash as all or part of the Acquisition Consideration.

6. **DGCL:** the Delaware General Corporation Law, serving as a paradigm corporation statute in the U.S., and frequently the basis of incorporation by U.S. companies, wherever physically based, that intend to do business across the U.S. as well as inbound subsidiaries of non-U.S. companies wishing to have operations in the U.S.

7. **DoJ:** the U.S. Department of Justice.

8. **Due Diligence:** the scope of the parties' disclosures to each other before the M&A transaction closes, generally buttressed by deal protections in the form of warranties, representations, covenants and linked rights of indemnification, termination, conditions to closing and others.

9. **EBITDA:** Earnings Before Interest, Taxes, Depreciation and Amortization, a common accounting metric.

10. **Exchange Act:** the Securities Exchange Act of 1934, as amended, governing resales of already-issued securities, both debt and equity, and the periodic reporting obligations of publicly registered companies.

11. **Fixed Exchange Ratio:** Where not all the Acquisition Consideration is in cash, parties can also allocate risk of pre-closing volatility through adjustable pricing formulas. In a Fixed Exchange Ratio, each of Target's shares is converted into a fixed number of Acquiror's shares based on a negotiated and fixed exchange ratio. Under a fixed exchange structure, the dollar value of the fixed number of Acquiror shares received by Target/Target shareholders can rise or fall in the period after the deal is signed and when it closes, thereby changing the value of the Acquisition Consideration, either as a result of Acquiror's business performance, market reaction to the pending deal, or general market/industry conditions incidentally affecting Acquiror. Fixed Exchange Ratios are most common in larger, stock-for-stock "merger of equals" transactions, since both parties share the risk of movement in Acquiror's share price. Fixed Exchange Ratio transactions are also traditionally common in sectors of perceived volatility, such as the tech sector, and Acquiror's resulting position that volatility risk in its stock price should be shared.

12. **Fixed Value Ratio:** In a Fixed Value Ratio transaction, it is the exchange ratio that floats and Target shareholders receive a fixed dollar value of Acquisition Consideration, however many Acquiror shares that works out to cost. The formula usually provides for measuring Acquiror's stock price during a negotiated period of days or weeks prior to closing or a meeting of Target's stockholders to approve the transaction. A fixed value pricing formula is used to insulate Target's shareholders from risk from changes in Acquiror's share value prior to closing, whether from the Acquiror's business performance, market reaction to the pending deal, or general market/industry conditions incidentally affecting Acquiror. Fixed Value Ratio transactions are traditionally most common when one party is clearly Acquiror and the other clearly Target, rather than in the "merger of equals" context and, unlike in Fixed Exchange Ratio transactions, pose the risk for Acquiror that it may have to issue more shares to purchase Target's shares if Acquiror's share value declines during the measuring period, which may reduce the stock value and dilute existing Acquiror shareholders (of course, a rise in Acquiror's stock value prior to closing will allow it to close the transaction on fewer shares). Also, in Public M&A, hostile bidders often use Fixed Value Ratio structures because they have more appeal for Target

shareholders, who may be solicited under a tender offer and are more likely to tender based on a known dollar compensation for their shares.

13. **FTC:** **t**he Federal Trade Commission, the U.S. antitrust/competition regulator.

14. **GDPR:** European Union 2018 General Data Protection Regulation.

15. **HSR:** Hart-Scott-Rodino Antitrust Improvements Act of 1976 (§7A of the Clayton Act, 15 U.S.C. §18a), providing for mandatory pre-merger clearance notification for qualifying transactions.

16. **IRS:** the Internal Revenue Service, the U.S. federal tax regulatory and enforcement agency.

17. **IP:** Intellectual Property, whether Patent, Copyright, Trademark, Trade Secret, Data or other.

18. **JV:** Joint Venture. JVs usually imply a formal collaboration short of merger or acquisition between two or more enterprises through a newly formed business entity or contract, as opposed to "Strategic Alliances," which usually involve two or more parties working to achieve a specific goal of mutual interest while remaining independent.

19. **LLC:** a limited liability company organized under a state's LLC statute, generally offering the limited liability protection for shareholders of corporations with the "pass-through" taxation of partnerships (i.e., not taxed at the LLC level, but taxable income or loss is "passed through" to the owners, called "members," equivalent to a corporation's shareholders). Also usually featuring less burdensome management and governance costs and formalities than equivalent corporations.

20. **LP:** a limited partnership under a state's limited partnership statute (usually modeled on the Uniform Limited Partnership Act), generally offering the limited liability protection for shareholders of corporations with the "pass-through" taxation of partnerships (i.e., not taxed at the LP level, but taxable income or loss is "passed through" to the limited partners, equivalent to a corporation's shareholders). Also usually featuring less burdensome management and governance costs and formalities than equivalent corporations.

21. **M&A:** generally used abbreviation for "Mergers & Acquisitions," a catch-all term sweeping up Stock Purchases, Asset Purchases and Mergers, all involving the legal or *de facto* acquisition of all or a majority of one business's stock or assets by another business.

22. **Merger (or Statutory Merger):** a process set forth in the company law statutes of the individual states by which two companies merge with each other, leaving one company or its subsidiary as the Surviving Entity, while the other company merges into that company or its subsidiary and ceases to exist as a separate legal entity.

    a. **Direct Merger:** A Merger structure in which Target merges directly into Acquiror, which is the Surviving Entity, while Target ceases to exist.

    b. **Reverse Merger:** A Merger structure in which Acquiror merges into Target, which is the Surviving Entity, while Acquiror ceases to exist.

    c. **Forward Triangular Merger:** A Merger structure in which Acquiror forms a subsidiary (**Merger Sub**) (or uses a pre-existing subsidiary), Target merges into Merger Sub, Merger Sub is the Surviving Entity and a subsidiary of Acquiror, while Target ceases to exist.

    d. **Reverse Triangular Merger:** A Merger structure in which Merger Sub merges into Target, Target is the Surviving Entity and becomes a subsidiary of Acquiror, while Merger Sub ceases to exist.

    All of these Merger structures are diagrammed in M&A I.

23. **Merger Agreement (or Agreement and Plan of Merger):** a contractual agreement serving as the principal document by which a Merger is effected.

24. **Merger Consideration:** the Acquisition Consideration in a Merger.

25. **Preliminary Document: (MOU, or Memorandum of Understanding; LOI, or Letter of Intent; or Term Sheet. Also, NDA, or Non-Disclosure Agreement, which may be part of an MOU, LOI or Term Sheet or a standalone Preliminary Document):** forms of preliminary documentation used to set

a framework for an M&A transaction and confidentiality before executing documents like an Asset Purchase Agreement or Stock Purchase Agreement. Some terms in preliminary documentation may be binding on the parties for a certain period, for example confidentiality or exclusivity, while others are usually not binding.

26. **Public M&A:** M&A transactions involving a Target that is a public reporting company under the Exchange Act, requiring a substantial Exchange Act and SEC regulatory overlay of requirements for the transaction.

27. **Regulation 14A:** Exchange Act Regulation 14A requires the filing and distribution to Target shareholders of a proxy statement on Schedule 14A for transactions in which shareholder approval is required, including one-step Mergers.

28. **Regulation 14C:** Regulation 14C is used to furnish similar information to Regulation 14A for transactions in which shareholder approval is not required.

29. **Regulation 14D:** Regulation 14D prescribes some Tender Offer modalities by an affiliate of the Target or a third party, such as Acquiror.

30. **Regulation 14E:** Regulation 14E governs terms and conditions of all Tender Offers, whether by Target, Acquiror or another party.

31. **Rule 14d-10:** Rule 14d-10 provides for equal treatment of all Target shareholders in a Tender Offer.

32. **Rule 13e-4:** Rule 13e-4 governs Tender Offers by Target for its own securities.

33. **Schedule 14D-9:** Schedule 14D-9 is used by third parties, such as an Acquiror, that uses other third parties to recommend or solicit Target shareholders for the Tender Offer, disclosing those third parties and their relationship to the party other than Target making the Tender Offer.

34. **Schedule TO:** Schedule TO, the Tender Offer statement, is used to commence a Tender Offer.

35. **SEC:** the Securities and Exchange Commission, the U.S. federal securities regulator.

36. **Securities Act:** the Securities Act of 1933, as amended, governing initial issuances of securities, both debt and equity.

37. **Stock Purchase:** a transaction by which one party purchases all or the majority of the stock of another party. Distinguished from a minority investment by one party in the other, such as a typical venture capital investment, which is not an M&A transaction.

38. **Stock Purchase Agreement:** a contractual agreement serving as the principal document by which a Stock Purchase is effected.

39. **Surviving Entity:** the company that continues its corporate existence and operations following a merger.

40. **Target (or Seller):** the seller, or "sell side" party in an M&A transaction, whether an Asset Purchase or a Stock Purchase, which sells all or the majority of its stock or assets to another business, the Acquiror. In a Merger, the parties are not technically purchaser or seller, but when one party is clearly the less dominant party in the transaction, and is often the merged party (though not always, as in the case of a Reverse Merger or Reverse Triangular Merger, that party can be thought of as the Target.

41. **Tax Code:** the U.S. Internal Revenue Code, 26 U.S.C.

42. **TCJA:** the Tax Cut and Jobs Act of 2017.

43. **Tender Offer:** An offer to buy all or most of the publicly held shares of a public reporting company.

44. **USPTO:** U.S. Patent and Trademark Office.

45. **Williams Act:** the Williams Act requires Acquiror or any investor acquiring more than 5% of Target's stock to file Schedule 13D or, in some circumstances, Schedule 13G, called "Beneficial Ownership Statements, with the SEC within 10 days of exceeding the 5% threshold, to alert Target, Target shareholders and other market participants to potential or impending M&A activity.