

## MERGERS & ACQUISITIONS 7: MERGERS: DEAL POINTS

December 2024

### I. Executive Summary

This is the seventh of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first six in the series, “Mergers & Acquisitions 1: Overview and Transaction Types” ([M&A 1](#)); “Mergers & Acquisitions 2: Tax Structuring Considerations” ([M&A 2](#)); “Mergers & Acquisitions 3: Structuring Payment” ([M&A 3](#)); “Mergers & Acquisitions 4: LOIs, MOUs and Term Sheets” ([M&A 4](#)); “Mergers & Acquisitions 5: Stock Purchases” ([M&A 5](#)); and “Mergers & Acquisitions 6: Asset Purchases” ([M&A 6](#)), it is meant to offer to business executives, in-house counsel and their professional advisers an M&A guide both accessible and of practical use when embarking on an M&A transaction in their own business. This advisory will discuss Mergers and their principal deal document, the Merger Agreement or Agreement and Plan of Merger. All advisories in the series will be available on our website at [Kurtin PLLC Mergers & Acquisitions](#).

Following the discussion in each advisory in the series are “Deal Points” on considerations in the purchase or sale of a business that we often raise when we handle these types of transactions for our clients: what to do, and *what at all costs not to do*. Future editions in the series will drill down on issues in securities law considerations, especially when public reporting companies under the Exchange Act are parties to the M&A transaction and there is a substantial federal securities law regulatory compliance overlay to the transaction (Public M&A); antitrust (competition) law issues, which may change substantially in 2025 as a result of the U.S. presidential election in November 2024; financing the M&A transaction, such as by issuing stock or incurring debt; foreign investment review and technology export rules; employment and equity-based compensation; Cross-border M&A (where Acquirer and Target are domiciled in different countries); Due Diligence and corporate governance; appraisal rights and remedies; M&A of bankrupt or distressed Targets; hostile takeovers; spin-offs, “going private” and leveraged buyout transactions; other specialty transaction structures within and without the three basic M&A paradigms of Stock Purchase, Asset Purchase and Merger; and industry-specific regulatory regimes. A progressively cumulative glossary of defined technical terms used will appear at the end of each advisory in the series as Appendix 1.

## II. Mergers

Mergers, or Statutory Mergers (we will use the terms interchangeably here, although non-statutory, or *de facto* mergers exist), are fundamentally different from Stock Purchases ([M&A 5](#)) and Asset Purchases ([M&A 6](#)). Those transactions are essentially negotiated agreements between Acquirer and Target.

Mergers are different. Mergers are not simply private contracts between legal entities; as a transaction structure they exist only pursuant to merger statutes contained in their state corporate laws, such as the Delaware General Corporation Law (DGCL). The use of a Statutory Merger provides both ease and legal certainty; when the Certificate of Merger or Merger Agreement is filed with the Secretary of State of the state or states of incorporation, one company (the “Merging Entity”) merges into the other, the Merging Entity’s legal existence ends, and its assets and liabilities transfer to the Surviving Entity.

To execute a Merger, the parties must comply with the Merger statutes of the states in which both the Surviving Entity and the Merging Entity are domiciled. We’ll assume here that both Merger parties are Delaware corporations, but one or both can be domiciled in other states, or other countries. Mergers between Delaware corporations are governed by DGCL §251 (§251 also provides for “Consolidations,” in which both Merger parties merge into a newly-formed corporation, which becomes the Surviving Entity). §252 governs mergers between Delaware corporations and “foreign” (i.e., not Delaware) corporations. One or both Merger parties may also be another legal entity like limited partnerships (LPs) or limited liability companies (LLCs). DGCL §§263 and 264, respectively, provide for Mergers between Delaware corporations and LPs and LLCs; the Delaware LP and LLC statutes have corresponding provisions. The most common Merger structuring paradigms are:

A. Direct Merger. In a Direct Merger, Target merges into Acquirer. Target ceases to exist, and Acquirer is the Surviving Entity, succeeding to Target’s assets and liabilities (Successor Liability).

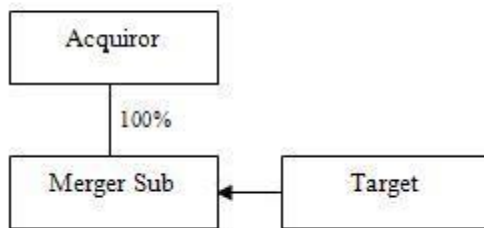
### Direct Merger



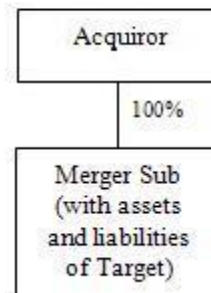
- B. Forward Triangular Merger. In a Forward Triangular Merger, Acquirer forms a new subsidiary shell corporation, usually cunningly named Merger Sub (or uses a pre-existing subsidiary) to serve as a vehicle for the merger (that’s what makes it a “Triangular Merger”; there are three parties), Target merges into Merger Sub, and Merger Sub is the Surviving Entity and a wholly-owned subsidiary of Acquirer. Merger Sub generally changes its name post-transaction, often adopting Target’s name.

**Forward Triangular Merger**

*Pre-Merger Diagram*



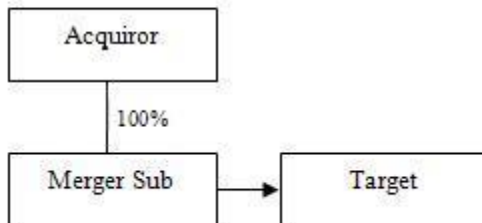
*Post-Merger Diagram*



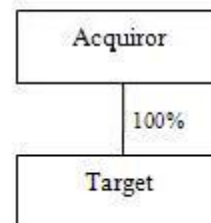
- C. Reverse Triangular Merger. In a Reverse Triangular Merger, Acquirer again forms Merger Sub, but in this structure, Merger Sub merges into Target, rather than Target merging into Acquirer (it’s a “Triangular Merger,” since there are three parties, and it’s a Reverse Triangular Merger, since Merger Sub merges into Target, not Target into Merger Sub). Merger Sub ceases to exist and post-transaction, Acquirer is the parent of Target, now Acquirer’s wholly-owned subsidiary and the Surviving Entity. Since Target continues to exist, it can keep its name.

**Reverse Triangular Merger**

*Pre-Merger Diagram*



*Post-Merger Diagram*



Compared to the Direct Merger and Forward Triangular Merger paradigms, in which Target ceases to exist, in a Reverse Triangular Merger, Target continues its corporate existence and business life, but as Acquirer's wholly-owned subsidiary as the Surviving Entity. The Reverse Triangular Merger structure often allows Acquirer to take control of Surviving Entity/Target without triggering anti-assignment provisions in third-party contracts to which Target may be bound, and without the need to negotiate and enter into new employment agreements with Target employees (but beware of "change of control" provisions in those contracts, which may be activated by the Merger even if Target continues to exist; going through those Target contracts is a key part of Acquirer Due Diligence. Also, government contracts, particularly with the Department of Defense (DoD) or with other national security implications, can require clearance by the DoD or other government agency even if there is no formal change of control provision). The need to obtain third-party consents and the assignment clauses of agreements to which Target is a party can be a significant factor in driving transaction structuring. Some third-party agreements can represent so much of Target's enterprise value that a failure to obtain the third-party consent to assignment can derail the transaction.

- D. Merger Consideration. Mergers are stock-for-stock transactions, generally structured as either "Fixed Exchange" ratio transactions in which the number of the Surviving Entity or Acquirer shares to be exchanged for the Merging Entity's/Target's shares and given to Merging Entity's shareholders is fixed and the dollar value of the Merger Consideration 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 share price; the Merger Agreement will contain a formula for measuring the average value of the stock values over a specified period of time to set the exchange ratio at Closing); or "Fixed Value" transactions, in which the dollar value of the Merger Consideration is fixed, but the number of Surviving Entity/Acquirer shares to be exchanged for Merging Entity's/Target's stock can rise or fall prior to closing, placing the risk of movement in Acquirer's share value or price squarely with Acquirer, 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 Acquirer and the other company is clearly the Target (see [M&A 3](#), Section III(a)). Price protection provisions to limit Merger Consideration volatility in Fixed Value transactions like "Collars," "Caps" and "Floors," can also be used to function as "circuit breakers" and limit Acquirer's risk (also discussed in [M&A 3](#), Section III(b)).

- E. Merger Procedure. Execution of a Statutory Merger requires several steps. For example, DGCL §251 requires, broadly, that (i) a Merger Agreement or Agreement and Plan of Merger be prepared, which must set forth: the terms and conditions of the Merger, the mode of putting the Merger into effect, changes to be made to the Surviving Entity's Certificate of Incorporation (or, in the case of a Consolidation, in the newly-formed Surviving Entity's Certificate), the manner of conversion of shares of the Merging Entity into the Surviving Entity's/Acquirer's shares or other securities, and other provisions desired by the Merger or Consolidation parties (see Section III, below, for more detail); (ii) the Board of Directors of each Merger party must adopt a resolution approving the Merger Agreement; (iii) the Merger Agreement must generally then be submitted to each Merger party's stockholders at an annual or special meeting for their approval (there are exceptions to this requirement set forth in §251); and (iv) 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.
- F. Tax-Free Treatment. As with Stock Purchases and Asset Purchases, the paradigm Merger transaction is fully taxable, with Target and ultimately Target shareholders recognizing a full gain or loss on the transaction. However, when properly executed, a Statutory Merger, including the Direct Merger, Forward Triangular Merger and Reverse Triangular Merger structures diagrammed and discussed here, qualifies for tax-free treatment pursuant to Tax Code §368(a)(1)(A) and, depending on the transaction, potentially other Tax Code §368(a)(1) subsections and 26 Code of Federal Regulations (CFR) §1.358-6 (Tax Code regulations for the stock basis in certain triangular reorganizations) (see [M&A 2](#), Section II). If executing a taxable Merger, it may be possible to make a Tax Code §338 election (see [M&A 2](#), Section III). Nevertheless, taking advantage of tax-free treatment is often one of the main reasons to do a Statutory Merger as opposed to other, taxable transaction structures like a taxable Stock Purchase. As we will see in a later edition of these series, Statutory Mergers with tax-free treatment under §368(a)(1)(A) are also almost always the M&A structuring format used for Public M&A.

The §368(a)(1) tax-free reorganizations all require, as a general matter, that there be (i) a continuity of ownership interest, meaning that at least the majority of the Acquisition Consideration or Merger Consideration, the price paid by Acquirer or Acquirer's shareholders to Target or its shareholders, be in stock, allowing Target's shareholders' original investment to notionally continue, and not be

cash out; (ii) a post-acquisition or Merger continuation of Target's business enterprise; and (iii) a valid business purpose for the transaction (i.e., not just tax avoidance).

The Direct Merger, Forward Triangular Merger and Reverse Triangular Merger transaction structures diagramed and discussed here would, when carried out properly, qualify as tax-free reorganizations under §368 provided the foregoing and additional requirements below are met:

Direct Merger. To qualify as a tax-free "A" Reorganization, at least 50% of the Merger Consideration must normally be in Acquirer stock, the basic rule of §368(a)(1). Any amount of Boot (Merger Consideration paid in cash, assumption of debt or other property) will be taxable to the Target's shareholders. The "solely for Acquirer voting stock" and "substantially all of Target's assets" rules that we saw were required for tax-free treatment of Stock Purchases and Asset Purchases (see [M&A 2](#), [M&A 5](#) and [M&A 6](#)) do not apply for the Direct Merger structure, giving it unusual flexibility, in that up to 50% of the Merger Consideration can be Boot. However, the Direct Merger structure does expose Acquirer to Successor Liability of Target's liabilities. The "solely for Acquirer voting stock" and "substantially all of Target's assets" rules do come back into play for Forward Triangular Mergers and Reverse Triangular Mergers, as set forth below.

Forward Triangular Merger. To qualify as a tax-free "A" Reorganization, at least 50% of the Merger Consideration must normally be in Acquirer stock issued to Target shareholders. Merger Sub must be at least 80% owned by Acquirer. No Merger Sub stock may be used as Merger Consideration. As with a Direct Merger, any amount of Boot will be taxable to the Target's shareholders. In the transaction, Merger Sub must acquire "substantially all" of Target's assets, meaning in general practice at least 90% of the fair value of Target's net assets and 70% of its gross assets, which functions as a "safe harbor" for the IRS's treatment of the Merger as a tax-free reorganization.

Reverse Triangular Merger. To qualify as a tax-free "A" Reorganization, in addition to the requirements for tax-free treatment of a Direct Merger or a Forward Triangular Merger, Merger Sub must acquire at least 80% of Target's voting stock and 80% of any other classes of Target stock in exchange for Acquirer's stock. Also, Target must retain substantially all its assets post-transaction. As with a Direct Merger or Forward Triangular Merger, any amount of Merger Consideration paid in Boot will be taxable to the Target's shareholders but cannot exceed 20% of the fair value of Target's stock without invalidating the tax-free treatment of the transaction as a whole.

### III. Merger Agreements

The principal document in a Merger is the Merger Agreement, sometimes called the “Agreement and Plan of Merger.” Many of the elements of an Merger Agreement are similar to those in a Stock Purchase Agreement as described in Stock Purchases (see [M&A 5](#), Section III. However, DGCL §251 requires certain elements to be present in the Merger Agreement, and allows others negotiated by the parties. Following are the most significant items treated in most Merger Agreements, not necessarily in the order in which they would appear in the agreement itself.

#### A. Merger Agreement Elements Required by DGCL §251.

(bear in mind that the Merger statutes of states other than Delaware will have differing required elements. A Merger Agreement between a Delaware corporation and another state corporation pursuant to DGCL §252 will have to comply with both the DGCL and other jurisdiction’s requirements.)

1. Terms and Conditions of the Merger or Consolidation.
2. Mode of Carrying Out the Merger or Consolidation (as described in Section II, above).
3. Amendments or Changes to be Made to the Surviving Entity’s Certificate of Incorporation, if any, including a full restatement of the Certificate (only relevant for a Merger).
4. In the case of a Consolidation, the newly-formed Surviving Entity’s Certificate of Incorporation as an annex to the Merger (Consolidation) Agreement.
5. The manner of conversion of Merging Entity shares into Surviving Entity shares, including cancellation of outstanding shares not being converted and any cash, rights, property or other securities, received by Merging Entity shareholders in addition to or instead of converted Surviving Entity shares.
6. Other Desired Provisions, including relating to Boot as Merger Consideration.

B. Common Optional Additional Merger Agreement Elements.

- a. Definitions. Merger Agreements, like Stock Purchase Agreements and Asset Purchase Agreements, will invariably have a definitions or glossary section of defined terms.
- b. Intended Tax Treatment. Whether any particular tax-free or tax-advantaged treatment for the transaction will be sought in the structuring should be identified in the Merger Agreement (see Section II(F), above, and [M&A 2](#)).
- c. Merger Consideration. In addition to the mandatory manner of conversion of Merging Entity shares into Surviving Entity shares, any additional Merger Consideration elements should be set out: any Merger Consideration control devices in place, such as Fixed Exchange or Fixed Value ratios, Collars, Caps or Floors, that could alter the number or dollar value of Surviving Entity shares to be exchanged for Merging Entity shares (see [M&A 3](#)).
- d. Effects of the Merger. What Merger party merges into the other, what company is the Surviving Entity.
- e. Resignation of Directors and Officers. The Merger Agreement generally provides for resignation of Target/Merging Party directors and officers.
- f. Merger Consideration Adjustments. Whether any pre-closing or post-closing discoveries or events can cause an adjustment to the Merger Consideration short of termination of the Merger pre-Closing or rescission post-Closing; these can be any variety of negotiated events: a pre-Closing change in Target valuation outside the Collar, if the Merger Agreement has set one; examples of such issues might be stock splits or reverse stock splits, stock recapitalization, failure to obtain financing, failure to obtain third party consents, failure to obtain assignment of third party contracts, failure to obtain a regulatory approval; a change in Target stock price; dividend payments; stock distributions; Due Diligence revelations; events not disclosed in Due Diligence or scheduled exceptions to Representations and Warranties, such as undisclosed pending or threatened litigation, issues relating to accounting, such as changes to expected accounts receivable or cash on hand, which might adjust the purchase price up or down.

- g. Closing. When Closing of the Merger will occur and under what circumstances.
- h. Closing Deliveries. Each party's required deliveries at Closing, from share certificates to executed documents to certified checks or wire transfer receipts.
- i. Conditions to Closing. A list of conditions to each party's obligation to close the transaction, the failure of which to occur will excuse that party's obligation to close, such as that all previously made Representations and Warranties continue to be true as of Closing; that all Affirmative or Negative Covenants have been fulfilled as of Closing; that no "Material Adverse Change" or "Material Adverse Event" as defined in the Merger Agreement affecting Target's business has occurred (often called a MAC or MAE clause); that all third-party consents and regulatory approvals have been obtained; that insurance coverage commitments have been obtained; that "fairness opinion" letters on the fairness of the transaction to Target and Target's shareholders have been obtained (usually a feature of Public M&A); and others. Conditions to Closing are usually tied to Termination rights if a condition has not been satisfied within a given time period.
- j. Representations and Warranties. Each party's (usually Target on one side and both Acquirer or Merger Sub on the other side) undertaking that a something is true and can be relied upon as of the date of the Merger Agreement signing and (usually) will continue to exist until the Closing. Some are very basic and nearly universal and often made by both or all three parties: that each party is properly formed and organized; in good standing in its home jurisdiction of domicile and every jurisdiction in which it does business; has no liens, tax or otherwise, against it, etc.; that the Merger has been duly authorized by proper corporate action (directors' resolutions, shareholder consents, etc.); validity of financial statements; that insurance of various kinds is in place; that the Merger will not contravene any law, regulation or third-party right; that except as listed in an annexed schedule, there are no material undisclosed liabilities or contingencies such as debts, threatened or pending litigations or administrative/regulatory proceedings, etc. Other Representations and Warranties are more technical, specific to the parties and transaction, and asymmetrical, made by only one party (usually Target) and not the other: that Target owns and has the right to convey its assets by Merger; that certain material Target third-party contracts are in good standing and has not been breached; that the Target has certain government licenses and permits in place and in good standing; that Target owns or has the right to use (by license,

assignment or otherwise) certain Intellectual Property and the extent and duration of those rights; that Target and any subsidiaries have not incurred or guaranteed any more than a stated level of indebtedness. Representations and Warranties are generally tied to Conditions to Closing and Termination rights, such that a breach can justify the other party in refusing to Close or Terminate the transaction, or justify a Merger Consideration adjustment up or down, depending on whether Acquirer or Target was at fault. However, Representations and Warranties, especially in Public M&A generally do not survive past the Closing.

- k. Covenants. Sometimes confused with Representations and Warranties, but different in that they not representations that a state of affairs exists and will continue to do so until Closing, but each party's promises either to do something (or continue doing something) until and sometimes after Closing (Affirmative Covenants) or to refrain from doing something until/until after Closing (Negative Covenants). Examples might include Target Covenants to maintain various regulatory approvals or licenses (Affirmative), or not to let an approval or license lapse (Negative); not to compete with the Acquirer and the acquired business after Closing, etc. Covenants are also generally tied to Conditions to Closing and Termination rights, such that a Covenant breach can justify the non-breaching party in refusing to Close and/or Termination of the Merger. Generally, Covenants, like Representations and Warranties, do not survive beyond Closing, but some can be agreed to survive during a limited post-Closing period.
- l. Indemnification. Indemnification rights, the right of one party to claim against another for indemnification from third-party claims. There are also "carve-outs" to indemnification rights, such as when a generally indemnified type of event has a subset that might occur without either party being at fault, or when an indemnified event falls short of an agreed-to threshold in potential damages. There are even sometimes "exceptions to carve-outs." Indemnification rights in Mergers also usually terminate at Closing.
- m. Ancillary Documentation. In any Merger, there will be ancillary documents to the Merger Agreement, such as financing documents; security agreements; Intellectual Property license and assignment agreements; employment and equity-based compensation agreements (stock option or stock grant plans, etc.); real estate leases or conveyance documents and others. The Merger Agreement will often pitch a list of ancillary documents out to a schedule of annexes, and their due execution and delivery will often be Closing deliveries and Conditions to Closing.

- n. Compliance with Law. The parties will frequently negotiate obligations (whether by Covenant or otherwise) to comply with applicable laws, such as those governing foreign corrupt practices or bribery, technology export restrictions, foreign investment controls, money laundering and others.
- o. Key Employee Lock-ups and Equity-Based Compensation. Often, key Target employees will sign employment agreements with the post-transaction company and the terms of employment are included, as are stock option or other stock rights plans for selling Target or other shareholders. Obtaining key employee employment agreements to work for the Acquirer can be a Covenant and a Condition to Closing.
- p. Board, Officer and Committee Representation. Often, the Plan of Merger will set out post-Closing Surviving Entity Board of Directors representation, officer positions and committee representation on the Surviving Entity.
- q. Confidentiality. Confidentiality as to Due Diligence production and other information exchanged between the parties during the transaction is often one of the most critical issues in the transaction, continued in the Merger Agreement after the Preliminary Document stage and one of the most frequently sought to be binding on the parties.
- r. Regulatory Approvals. Any federal, state, local or non-U.S. governmental or regulatory approvals required for the transaction as a Condition to Closing are often part of the Merger Agreement, including by when must they be obtained, whose responsibility it is to do so, and what are the consequences of failing to obtain regulatory approvals, bearing in mind that doing so is not fully in the responsible party's control. Are there foreign investment or foreign ownership issues? Are there technology export issues? Are there foreign corrupt practices, bribery or money laundering issues? Do licenses need to be obtained or assigned from Target to Acquirer, or the need for them waived? Often, the need for regulatory approvals is the biggest cause for delay in closing a transaction after signing the Merger Agreement or even in one terminating without Closing.
- s. Exclusivity. It's common for Merger Agreements to contain "no shop" or "go shop" clauses prohibiting or permitting (in some cases) Target to solicit, encourage or entertain competing

offers for a Merger from third parties for a certain period within with closing is expected to occur. Often, such clauses have a “fiduciary out” carve-out, which allows Target’s Board of Directors to consider competing offers when its fiduciary duty to Target shareholders require it. We will discuss that and related issues in a future M&A: Deal Points edition on fiduciary duties, the “Business Judgment Rule” and related topics.

- t. Major Contracts and Third-Party Consents. Major Contracts may materially affect deal value, and, like regulatory approvals, may require third party approvals not completely within the parties’ control. The Merger Agreement, following up the Preliminary Document, should deal with major contracts, what third party consents are needed, and whose responsibility it is to obtain them.
- u. Termination and Effects of Termination. A failure of a Condition to Close, such as a material and uncured breach of Representation, Warranty or Covenant; another material breach of the Merger Agreement; a failure to obtain financing or to obtain a critical regulatory or third-party approval; or delay beyond a certain point in doing so, may allow the non-breaching party to terminate the Merger. Some breaches may give the non-breaching party the right to terminate immediately; some may give the breaching party the chance to cure the breach before Closing or allow for a purchase price adjustment to reflect the damage caused by the breach. There are sometimes “break-up fees” provided for to the non-breaching party to compensate it for its transaction time, effort and costs, and the opportunity costs of not have sought or obtained a deal with another party.
- v. General Provisions. Almost invariably, the final article of every Merger Agreement will have sections derisively known as the “boilerplate” or “general” provisions. Like the definitions, the boilerplate does not always repay the sneers. Some provisions, like choice of governing law, choice of dispute resolution forum, assignment rights, confidentiality, third party beneficiaries, releases, rules of construction and others may provide critical rights; like the definitions, they should not be dismissively treated.

#### IV. Deal Points

***Deal Point No. 1: Make sure that a Merger is the Transaction Structure Desired.*** Mergers generally involve Acquirer assuming all of Target's assets and liabilities. There are often good reasons to do a Merger, but often good reasons to choose a non-Merger Stock Purchase or Asset Purchase structure, such as Acquirer's ability to pick and choose assets in an Asset Purchase or obtain a "stepped-up" basis in Target's assets in a standard Stock Purchase pursuant to a Tax Code §338 election. Also, although Tax Code §368(a)(1)(A) tax-free treatment is only available for Statutory Mergers, other §368(a)(1) subsections are available Stock Purchases and Asset Purchases which have the same tax-advantaged benefits (see [M&A 2](#)).

***Deal Point No. 2: Tax Optimization is Not Tax Avoidance.*** Tax optimization is not tax avoidance. The M&A tax structuring methods reviewed above are U.S. federal statutes expressly set out in the Tax Code. Expertise is required to use them correctly, but they are there to be used. Don't be timid. Use them when appropriate. Pay required M&A transaction taxes, but not more than required.

***Deal Point No. 3: Don't sneer at the defined terms, use them and use them consistently.*** Many lawyers skip glassy-eyed over the definitions section and let things into them that are time bombs for their clients. Worst are lawyers who define terms in the definitions section and then don't use them, or don't use them consistently, with potential real-world consequences. Don't sneer at the defined terms.

***Deal Point No. 4: Use, but don't rely on, MAC or MAE clauses.*** MAC and MAE clauses have been staples of M&A panels at legal and investment banking conferences for years, but only one case is known in which the Delaware Chancery Court excused a party from closing a transaction because of the occurrence of a MAC or a MAE.

***Deal Point No. 5: Collars, Caps and Floors are valuable "circuit breaker" price protection, anti-volatility tools, so use them.*** Collars, Caps and Floors can protect not only against volatility in Fixed Exchange and Fixed Value deals, but against overpaying.

Owen D. Kurtin

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**Mergers & Acquisitions: Deal Points**  
**Cumulative Glossary**  
**Appendix 1**

- 1. Acquirer (or Acquiror, 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 Acquirer.
- 2. Acquisition Consideration:** the purchase price paid by Acquirer to Target in an M&A transaction, whether in cash, stock, assumed debt or a combination thereof.
  - a. Acquired Assets (or Included Assets):** in an Asset Purchase, the assets that are included in the acquisition by Acquirer, as opposed to “**Excluded Assets,**” which are not included and remain with Target.
  - b. Contingent Earnout:** a portion of the Acquisition Consideration held back until a set post-closing period, whether in escrow or by Acquirer itself, pending the post-closing business hitting certain milestones, or Representations, Warranties and/or Covenants turning out to be true.
- 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. Board of Directors:** the primary governing body of a corporation under the DGCL and other corporation statutes. The Board of Directors typically meets at least one time per year and at special, event-driven occasions, sets corporate policy, adopts resolutions, when required, submit matters to shareholder vote, and appoints and supervises corporate officers.

6. **Boot:** the cash or other non-stock portion (including debt assumption) of Acquisition Consideration in an M&A transaction intended to be a tax-free reorganization under Tax Code §368(a)(1), which, even if the transaction is treated as tax-free by the IRS, will be taxable to Target and/or Target shareholders. If the Boot exceeds the permissible percentage for the type of tax-free reorganization intended by the parties, the entire transaction may be denied tax-free status, not just the Boot portion.
7. **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 Merger Consideration.
8. **Certificate of Incorporation:** the document, whether original at formation, amended or amended and restated, that must be filed with a state Secretary of State to form or fundamentally amend a corporation. DGCL §§102-103 are the primary statutes governing the contents of Certificates of Incorporation for Delaware corporations.
9. **Closing:** the closing of an M&A transaction, which can occur after or simultaneously with the signing of the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement, depending on the agreement's terms. Merger Agreements often refer to the "consummation of the Merger."
10. **Conditions to Closing:** the enumerated conditions in a Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement, the failure of which to occur is a breach that can justify the non-breaching party in not closing the transaction, and which, subject to rights to cure, can lead to Termination of the transaction.
11. **Contingent Earnouts:** an agreement in an M&A transaction to hold back part of the Acquisition Consideration until sometime after Closing to assure that Target hits covenanted milestones post-Closing, or to assure that, post-Closing, certain other Covenants, Representations, or Warranties turn out to be true. An example might be an agreement to hold back part of the purchase price for a certain period to assure that Target is able to collect a represented amount of receivables, or that Target turns out to have a represented amount of cash on hand post-Closing. Contingent Earnout funds may be placed into escrow or just remain post-Closing executory payment obligations of Acquirer, contingent on the specified milestones or other conditions being met.
12. **Covenants:** sometimes confused with Representations and Warranties, but different in that they are not

representations that a state of affairs exists and will continue to do so until Closing, but each party's promises either to do something (or continue doing something) until and sometimes after Closing (Affirmative Covenants) or to refrain from doing something until/until after Closing (Negative Covenants). Examples might include Target Covenants to maintain various regulatory approvals or licenses (Affirmative), or not to let an approval or license lapse (Negative); not to compete with the Acquirer and the acquired business after Closing, etc. Covenants are also generally tied to Conditions to Closing and Termination rights, such that a Covenant breach can justify the non-breaching party in refusing to Close and/or Termination of the transaction.

- 13. Cross-border M&A:** M&A transactions in which Acquirer is domiciled in one country, and Target in another country. For purposes of this M&A: Deal Points series, one of those countries in which either Acquirer or Target is domiciled is the United States.
- 14. 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.
- 15. DoD:** the U.S. Department of Defense, sometimes colloquially called "the Pentagon."
- 16. 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.
- 17. EBITDA:** Earnings Before Interest, Taxes, Depreciation and Amortization, a common accounting metric.
- 18. 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.
- 19. Financial Investment:** an investment in one company by a financial investor such as a venture capital or private equity firm by purchase of a minority of the company's stock rather than all or a majority of

the company's stock and therefore not constituting an M&A transaction. Financial Investments are distinguishable from Strategic Investments (see below) in that the venture capital or private equity firm generally invests solely for return on investment and eventual "exit event," although a venture capital or private equity firm may have a strategic element in trying to assemble a group of "portfolio companies" that have a strategic relationship in a given industry.

**20. Fixed Exchange Ratio:** where all or some of the Acquisition Consideration or Merger Consideration is in Acquirer stock, 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 Acquirer's shares based on a negotiated and fixed exchange ratio. Under a Fixed Exchange structure, the dollar value of the fixed number of Acquirer 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 Acquirer's business performance, market reaction to the pending deal, or general market/industry conditions incidentally affecting Acquirer. Fixed Exchange Ratios are most common in larger, stock-for-stock "merger of equals" transactions, since both parties share the risk of movement in Acquirer's share price. Fixed Exchange Ratio transactions are also traditionally common in sectors of perceived volatility, such as the tech sector, and Acquirer's resulting position that volatility risk in its stock price should be shared.

**21. Fixed Value Ratio:** in a Fixed Value Ratio transaction, the exchange ratio that floats and Target shareholders receive a fixed dollar value of Acquisition Consideration, however many Acquirer shares that works out to cost. The formula usually provides for measuring Acquirer'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 Acquirer's share value prior to closing, whether from the Acquirer's business performance, market reaction to the pending deal, or general market/industry conditions incidentally affecting Acquirer. Fixed Value Ratio transactions are traditionally most common when one party is clearly Acquirer and the other clearly Target, rather than in the "merger of equals" context and, unlike in Fixed Exchange Ratio transactions, pose the risk for Acquirer that it may have to issue more shares to purchase Target's shares if Acquirer's share value declines during the measuring period, which may reduce the stock value and dilute existing Acquirer shareholders (of course, a rise in Acquirer'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.

**22. Intellectual Property or IP:** a copyright, trademark, service mark, patent, trade secret, certain kinds of confidential information, whether registered or not, or limited or unlimited right to use any of the foregoing, by license, assignment or otherwise.

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

**24. Joint Venture or JV:** 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.

**25. 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.

**26. LP:** a limited partnership under a state’s limited partnership statute, 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.

**27. 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.

**28. MAC (or MAE) Clause:** a clause in an M&A transaction document setting out negotiated Material Adverse Changes or Material Adverse Events the occurrence of which will justify the party prejudiced

by the MAC or MAE in not closing the transaction and terminating it. Sometimes a cure period to allow the offending party to remedy is allowed; sometimes the prejudiced party will give the offending party an extension of time, postponing closing without terminating the agreement, if the parties believe that the MAC or MAE is curable and both parties want the deal to close. As indicated, MAC and MAE clauses are generally linked to Conditions to Closing, Termination rights, Representations and Warranties, and Covenants.

**29. 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 Acquirer, which is the Surviving Entity, while Target ceases to exist.
- b. **Reverse Merger:** a Merger structure in which Acquirer merges into Target, which is the Surviving Entity, while Acquirer ceases to exist.
- c. **Forward Triangular Merger:** a Merger structure in which Acquirer 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 Acquirer, 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 Acquirer, while Merger Sub ceases to exist.

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

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

**32. Merging Entity:** the Merger party that merges into the Surviving Entity and ceases its legal existence.

- 33. 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.
- 34. 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.
- 35. Representations and Warranties:** Each party's undertaking that a something is true and can be relied upon as of the date of the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement signing and (usually) will continue to exist until the Closing. Some are basic and nearly universal: that each party is properly formed and organized; in good standing in its jurisdiction of domicile and every jurisdiction in which it does business; has no liens, tax or otherwise, against it, etc.; that the Target shares being purchased (and issued, in the case of Acquirer stock being used as Acquisition Consideration) are fully authorized, issued, outstanding and non-assessable, or that Target assets being purchased are Target's property, free and clear encumbrances, liens or other third-party claims; that the transaction has been duly authorized by proper corporate action; that the transaction will not contravene any law, regulation or third-party right; that except as listed in an annexed schedule, there are no material undisclosed liabilities or contingencies like debts, threatened or pending litigations or administrative/regulatory proceedings, etc. Other Representations and Warranties are more specific and asymmetrical, made by only one party and not the other: that a certain material Target third party contract is in good standing and has not been breached; that the Target has certain government licenses and permits in place and in good standing; that Target owns or has the right to use (by license, assignment or otherwise) certain Intellectual Property and the extent and duration of those rights; that Target and any subsidiaries have not incurred or guaranteed any more than a stated level of indebtedness.
- 36. SEC:** the Securities and Exchange Commission, the U.S. federal securities regulator.

- 37. Securities Act:** the Securities Act of 1933, as amended, governing initial issuances of securities, both debt and equity.
- 38. 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.
- 39. Stock Purchase Agreement:** a contractual agreement serving as the principal document by which a Stock Purchase is effected.
- 40. Strategic Investment:** an investment in one company by another by purchase of a minority of the company's stock rather than all or a majority of the company's stock and therefore not constituting an M&A transaction. Strategic investments are often made by a company vertically aligned with the other company, for example to assure its upstream supply chain or downstream distribution network. Sometimes, a strategic investment is made as a "toehold" or "foothold" as a prelude to later acquisition.
- 41. Successor Liability:** the assumption by one M&A party of the other's assets and liabilities, whether automatically by operation of law, as in a Merger or Stock Purchase, or contractually, as in an Asset Purchase.
- 42. Surviving Entity:** the company that continues its corporate existence and operations following a Merger or other M&A transaction.
- 43. Target (or Seller):** the seller, or "sell side" party in an M&A transaction, which sells all or the majority of its stock or assets to another business, the Acquirer.
- 44. Tax Code:** the U.S. Internal Revenue Code, 26 U.S.C., as amended.
- 45. TCJA:** the Tax Cut and Jobs Act of 2017.