MERGERS & ACQUISITIONS 9: FINANCING M&A: DEAL POINTS

February 2025

I. Executive Summary

This is the ninth of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first eight 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**); "Mergers & Acquisitions 6: Asset Purchases" (**M&A 6**); "Mergers & Acquisitions 7: Mergers" (**M&A 7**); and "Mergers & Acquisitions 8: Public M&A **(M&A 8)**, 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 focus on financing an M&A transaction, and therefore principally on Acquirer in putting together the Acquisition Consideration, whether through cash, use of existing Acquirer stock, issuance of new Acquirer stock, incurring of debt, assumption of Target debt or some combination thereof. 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 antitrust (competition) law issues, which may change as a result of the 2024 U.S. presidential election; Intellectual Property (IP) issues; 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 involving bankrupt or distressed Targets; hostile takeovers, in which Acquirer attempts to acquire Target without Target's Board's approval; spin-offs, "going private" and leveraged buyout transactions; other specialty transaction structures; and industry-specific regulatory regimes that affect M&A transactions in those business sectors. A progressively cumulative glossary of defined technical terms used will appear at the end of each advisory in the series as Appendix 1.

II. Financing an M&A Transaction

There are multiple ways to finance an M&A transaction:

- Cash. Cash as Acquisition Consideration can come from Acquirer's existing cash reserves, be borrowed, or generated from the sale of assets or stock, spinning off subsidiaries, or otherwise. Use of cash Acquisition Consideration by Acquirer almost always presumes that the Acquirer and Target are of unequal size, with Target the significantly smaller company; if the transaction were a merger or acquisition of "equals," it would be unlikely for Acquirer to be able to acquire Target with ready cash; Target would almost certainly be too expensive for that. Transactions that use cash as Acquisition Consideration are usually Stock Purchases or Asset Purchases in which Acquirer is a larger company than Target, rather than Mergers, which are almost always the form that Public M&A takes. Cash on the barrelhead should always command some premium to stock Acquisition Consideration. Stock, debt, or Acquisition Consideration to be paid in installments, in earn-outs or subject to any contingency is always, in some measure, consideration that may not be paid. The contingency is not merely covenanted events occurring or not occurring, but Acquirer's ability to pay it down the road. When a Target is considering competing offers, the cash-on-the-barrelhead one should always command a premium – cost less – than non-cash, or non-all cash competing offers.

  As discussed in **M&A 2**, if the Acquisition Consideration is paid in cash, the transaction will not be eligible for "tax-free" treatment under Tax Code §§368(a)(1)(A) - (G). However, the tax effects of a cash transaction may be ameliorated by use of the Tax Code section 338(g) and 338(h)(10) elections also described in **M&A 2**. Cash consideration may be payable in full at closing or in installments and subject to various post-closing contingencies. But cash on the barrelhead, paid in full at closing, is the most valuable and risk-free consideration from Target and Target's shareholders' point of view.

- Cash Election Merger. Potentially even more advantageous for Target than an all-cash merger is a "Cash Election Merger." In a "Cash Election Merger," the Target or Target shareholders are granted an election period in which to decide to accept cash or stock for part of the Acquisition Consideration, allowing them to assess the market reaction to the announced transaction and its effect on Acquirer's share value. The length of time of the election period is

often heavily negotiated, as is whether to treat all Target shareholders the same way in terms of cash election rights.

The economic reason that a Cash Election Merger can be more advantageous than an all-cash offer for Target and Target shareholders is that, while cash Acquisition Consideration might allow Target to buy Acquirer stock with the cash if it wanted, the then-market price of Acquirer stock might be higher and/or its availability lower than the election price and amount of stock set in the Cash Election Merger. A Cash Election Merger is really a kind of option for Target or its shareholders in which the Cash Election Merger price to buy Acquirer stock or take cash is effectively the option's "strike price," with the Target having the contractually-agreed election period before closing to decide whether the option is "in the money" or "under water," meaning whether it is more advantageous to take Acquirer stock as all or part of the Acquisition Consideration, or just to take cash, subject to the premium that cash over stock should always provide.

- Acquirer Stock. Acquirer stock can serve as all or part of the Acquisition Consideration. As discussed, Acquirer stock should always be discounted compared to cash and, all other things being equal, Target and Target shareholders will usually prefer cash to Acquirer stock; after all, if paid in cash, they can always buy Acquirer stock later with the cash if they want (assuming that it was available at the same price as it was in the transaction, which may not be the case, especially if the M&A transaction adds value to the post-transaction business as intended; a reason to lock in the option that a Cash Election Merger provides; see discussion above). Stock Acquisition Consideration should ordinarily be subject to a risk premium and a higher price than an equivalent cash deal would require, with the exceptions noted above. Conversely, Acquirer's use of stock as Acquisition Consideration can result in tax-free treatment for the transaction when the deal is structured properly, as described in **M&A 2**, which may compensate for some or all of the risk premium, as does a Cash Election Merger with a portion of the Acquisition Consideration paid in cash, and of course the parties may be buying into a business case in which the combined companies will be worth more post-transaction than the sum of their parts. In fact, if they *don't* believe that, it may be that they shouldn't be doing the deal.

  If Acquirer has authorized, but not issued or outstanding stock, that stock can be used as

Acquisition Consideration. If Acquirer must issue new stock for Acquisition Consideration, that stock will have to be authorized by appropriate Board action and then issued pursuant to Securities Act §5 registration or one of the exemptions from registration (see our *"Raising Capital through Private Placements"* and *"Raising Capital through Private Placements Exemption Chart,"* both available at **Kurtin PLLC Raising Capital**).

- Debt. If issuing short term notes or using a bank credit facility, term loan, revolving credit or otherwise, debt incurred as Acquisition Consideration may not be an issuance of securities and may not need to comply with the Securities Act. Issuance of long-term corporate debt, such as corporate bonds or debentures, is normally an issuance of securities.

- Assumption of Target Debt. Acquirer can also assume existing Target debt as part of the Acquisition Consideration, effectively reducing the Acquisition otherwise paid. The Stock Purchase Agreement, Asset Purchase Agreement, or Merger Agreement will provide for the assumption of debt, but ancillary documents will usually be needed, chiefly because the third-party holder of that debt must be involved. The third-party debt holder's consent to assignment of the debt and its assumption by Acquirer must generally also be obtained, showing up as a Covenant and a Condition to Closing in the main agreement. Assumption of Target debt should often command a premium, especially when the debt is restructured (with third-party debt holder consent) in the course of the M&A deal – the interest rate lowered, maturity date extended, covenants and collateral eased, etc.

  Assumption of debt may also be tax deductible for the Acquirer, although, since the 2017 Tax Cuts and Jobs Act (TCJA) lowered the maximum U.S. corporate tax rate from 35% to 21%, granted a 20% deduction on qualified business income and capped business interest (whether paid or accrued) deductibility, previously unlimited with a few exceptions, at 30% of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) through 2021, and 30% of EBIT thereafter, deductibility of interest is less of a transaction-structuring driver than it used to be. In any event, limitations on business interest deductibility should disfavor debt financing as a general matter, especially in times of rising interest rates. Among other things, convertible debt instruments, revolving credit facilities, term loans, debentures and short-term notes will all continue to change in relation to one another and to equity as a result of the loss of the full deduction, with the incurring of debt a more expensive proposition than before

However, it is important for Acquirer to remember when considering assumption of Target debt that the M&A transaction thereby becomes a marriage with three or more parties: the Target's creditor or creditors are also in the deal. As stated, creditors' consent to Acquirer's assumption of Target debt and transfer of obligation from Target to Acquirer, as well as what they might demand in exchange for that consent, as a contingency and a risk must be sought and programmed into the transaction from the point of Preliminary Documentation on; deals have cratered on failure to obtain creditor consent to assumption of Target debt. The use of the Reverse Triangular Merger structure can mitigate the risk, since in that structure, the Target is the Surviving Entity (see (**M&A 7**), but the third-party debt instruments may nevertheless have "change of control" provisions, necessitating obtaining third-party consent even if Target is the Surviving Entity.

III. Deal Points

Deal Point No. 1: Cash is King.

A cash-in-full offer should command a significant discount from other types of Acquisition Consideration, including competing offers that are not cash. Any non-cash offer should be considered as in some measure contingent and command a risk premium for Target and its shareholders. Put simply, any Acquirer willing to pay cash in full at closing should be able to pay less than other potential Acquirers offering non-cash deals in most circumstances, the main exceptions being when Target/Target shareholders expect a significant appreciation in Acquiror's share value as a result of the transaction or over time, want to participate in the post-transaction business for that or other reasons, or when tax-free structuring more than compensates for the assessed risk premium in taking stock instead of cash.

Deal Point No. 2: When using stock as Acquisition Consideration, make sure to allocate risk of pre-closing volatility.

Where all or some of the Acquisition Consideration is in stock, use Fixed Exchange and Fixed Value Ratio Formulas, Collars, Caps and Floors (see **M&A 3**) to allocate risk of pre-closing Acquisition volatility.

Deal Point No. 3: Use Tax Code reorganization provisions to improve the deal for both sides.

Tax optimization is not tax avoidance. The M&A tax structuring methods reviewed in **M&A 2** 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.

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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:** 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. Also, **EBIT**.

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, postposing 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 r the transaction.

35. **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.

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

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

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

39. **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.

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

41. **Rule 13e-4:** Rule 13e-4 governs Tender Offers by Target for its own securities **SEC:** the Securities and Exchange Commission, the U.S. federal securities regulator.

42. **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.

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

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

45. **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.

46. **Stock Purchase Agreement:** the principal document by which a Stock Purchase is effected.

47. **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.

48. **Successor Liability:** the assumption by on 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.

49. **Surviving Entity:** the company that continues its corporate existence and operations following a Merger or other M&A transaction.

50. **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.

51. **Tax Code:** the U.S. Internal Revenue Code, 26 U.S.C., as amended.

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

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

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

55. **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.