MERGERS & ACQUISITIONS 10: ANTITRUST MERGER CONTROL AND CLEARANCE: DEAL POINTS

March 2025

I. Executive Summary

This is the tenth 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**); "Mergers & Acquisitions 8: Public M&A **(M&A 8)**; and Mergers & Acquisitions 9: "Financing M&A" **(M&A 9)**, 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. This advisory will focus on the antitrust (competition) issues that can arise in U.S. M&A transactions, for which certain U.S. government agencies exercise oversight, what must be done to obtain their approval for those transactions to close, and the direction of government policy on antitrust M&A review, which shifted under the Biden administration from a decades-long relatively "hands-off," tolerant, laissez-faire policy to a more interventionist, activist policy, and which now may be shifting back in the second Trump administration. 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 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. Merger Review and Clearance

Section 7 of the Clayton Act of 1914 (15 U.S.C. 12 *et seq*., §18), passed to give teeth to the Sherman Antitrust Act of 1890 (15 U.S.C. §1 *et seq*.), prohibits mergers and acquisitions of either stock or assets whose effect "may be substantially to lessen competition, or tend to create a monopoly." The Clayton Act provides for a private right of action for violations of either it or the Sherman Act, with the possibility of treble damages, as well as criminal penalties. An amendment to the Clayton Act, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") (§7A of the Clayton Act, 15 U.S.C. §18a) requires the parties to acquisitions of any voting securities or assets of the acquired party above certain thresholds 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. The FTC adopted substantial rule changes to HSR reporting on October 10, 2024, which will be reviewed in Section IV below.

HSR reporting obligation thresholds are updated by the FTC yearly. Through the balance of 2025, HSR reporting obligations for most kinds of transactions arise when: (a) either the Acquirer or the Target is engaged in U.S. commerce or in any activity affecting U.S. commerce; *and either* (b) as a result of the transaction, the Acquirer would hold voting securities or assets of the Target in excess of **$505.8 million** *or* (c) as a result of the transaction, the Acquiror would hold voting securities or assets of the Target in excess of **$126.4 million** but not in excess of **$505.8 million** *and* (i) either the Acquirer or Target has total assets or annual net sales of at least **$252.9 million** *and* (ii) the other party has total assets or annual net sales of at least **$25.3 million**. New 2026 reporting thresholds will be set by the FTC early next year.

It is important to realize that, contrary to many M&A parties' assumptions that HSR reporting obligations are for the largest transactions only, relatively small M&A transactions can qualify for mandatory HSR reporting under the foregoing thresholds: first of all, the $505.8 million threshold at which all transactions are reportable now represents a relatively mid-market threshold; second, a very small or mid-market asset or stock acquisition that results in tipping the $126.4 million threshold – *inclusive of Target voting securities or assets already held by Acquirer* - could be a mandatory

reportable transaction. It's doubly important because failure to report reportable transactions was front and center on the FTC's radar screen under the former Biden administration and Lina M. Khan chairmanship: in 2021, for example, the FTC issued a warning to M&A parties not to seek to avoid HSR filings by structuring deals to retire seller/target debt rather than pay cash consideration that would exceed the reporting thresholds; also in 2021, the FTC issued a report analyzing 616 tech sector transactions valued at $1 million or more that were not reported under HSR, finding that 94 of them should have been reported. That report also found that assumption of debt and deferred or contingent compensation to sell-side founders was a significant component of acquisition consideration in the non-reported deals. (see, "FTC Sets Ambitious M&A Enforcement Agenda," September 29, 2021; and "FTC Warns on Use of Debt Retirement," September 17, 2021. Obviously, it remains to be seen to what extent HSR non-reporting will remain an FTC focus under the second Trump administration and new Andrew N. Ferguson chairmanship. Further information on these proceedings and other M&A resources are available at **Kurtin PLLC Mergers & Acquisitions**).

Filing fees for transactions that must be reported range from **$30,000** (for transactions valued at less than **$179.4 million**); to **$105,000** (for transactions valued at not less than **$179.4 million** but less than **$555.5 million**); to **$265,000** (for transactions valued at not less than **$555.5 million** but less than **$1.111 billion**); to **$425,000** (for transactions valued at not less than **$1.111 billion** but less than **$2.222 billion**); to **$850,000** (for transactions valued at not less than **$2.222 billion** but less than **$5.555 billion**); and **$2,390,000** (for transactions valued at **$5.555 billion** or more). The maximum civil penalty for non-compliance with the mandatory notification and waiting period is **$53,088** per day. Theoretical penalties for ignoring mandatory HSR reporting can go up to rescission of a closed transaction, so ignoring HSR reporting is a kind of M&A Russian Roulette.

The qualification "voting securities" exempts bonds, notes, mortgages, and similar instruments and is limited to securities allowing the owner or holder to vote for directors, or analogous persons in the case of unincorporated entities. Also, rules and regulations assess the total assets and annual net sales thresholds with reference not only to the party to the transaction, but to the total assets or annual net sales of companies or individuals under an "ultimate parent entity" with "control" established by 50% or greater ownership of voting rights or rights to distribution. The present contractual right to appoint at least half of the board of directors or equivalent governing body also establishes "control" for HSR purposes – convertible securities not conferring a present right to vote do not count. "Assets" include exclusive licenses for purposes of triggering HSR filing obligations, although rules and regulations

governing license territoriality, expiration, and reversionary rights to licensor may also come into play in assessing whether a given transaction is subject to HSR reporting.

A joint venture ("JV"), an ongoing business relationship between companies not involving an actual M&A transaction, in which a corporation, limited liability company ("LLC"), partnership or limited partnership ("LP") is formed to embody the joint venture can activate HSR's reporting requirements, because HSR treats each JV participant as an Acquirer and the JV entity that is formed as a Target. The formation of a general partnership or an LP or transfer of less than all of the interests in a partnership ordinarily does not require a HSR filing, subject to the rule concerning acquisition of the voting securities for any issuer included in the partnership.

By contrast, transfer of all of a partnership's interests is considered an Asset Purchase and is reportable under HSR. The formation of an LLC may trigger HSR reporting obligations if two or more pre-existing, separately controlled businesses are contributed and at least one of the members controls the LLC, in that it has a 50% "membership interest" or a right to 50% of the LLC's assets on dissolution. Post-formation acquisitions of LLC interests are not reportable except in certain circumstances in which the acquisition is treated as a new LLC formation.

Exemptions from the HSR filing requirements exist, notably for transactions in the ordinary course of business, acquisitions of certain voting securities or non-U.S. assets of a non-U.S. entity, and in the case of an acquisition by an institutional investor of 15% or less of an issuer's voting securities that is made strictly for investment purposes (the purchaser has no intention of participating in the issuer's business decisions) – another type of transaction deemed to be in "the ordinary course of business." The FTC or DoJ may request from the parties additional documentation and extensions of the waiting period. It should be noted that other U.S. government agencies have concurrent jurisdiction with the FTC and DoJ to approve M&A transactions; for example, the Federal Communications Commission ("FCC") has concurrent jurisdiction to approve M&A transactions for certain parties in the broadcast, wireline and wireless communications and satellite industries; however, the FCC's review is conducted under a "public interest" standard separate from the HSR/Clayton Act-based review by the FTC and DoJ.

Once documentation requests have been fully complied with and during the mandatory waiting period (including as extended), the FTC or DoJ may move for a preliminary injunction to block the proposed acquisition. If no such action is taken and the mandatory waiting period has expired, the transaction is

deemed to have passed HSR review and may proceed, subject to any other required regulatory review.

III. Shifting Merger Review Policy

From the beginning of the Biden administration in 2021, we covered the shift from a decades-long relatively tolerant, hands-off merger review and clearance policy to a far more activist, interventionist posture under former FTC Chair Lina M. Khan and DoJ Antitrust Chief Jonathan Kanter. Both Khan and Kanter considered "Big Tech" companies like Meta/Facebook, Alphabet/Google, Apple, Amazon and Microsoft to be serial monopolistic enterprises that suppress competition and attempt to monopolize their industries, often to the detriment of competition, innovation and consumers. During Khan's tenure, the FTC, often in concert with DoJ (all following cited Kurtin PLLC client advisories available at **Kurtin PLLC Mergers & Acquisitions**):

- Issued a warning to M&A parties not to seek to avoid HSR filings by structuring deals to retire Target debt in place of paying cash consideration (see, "FTC Issues Warning on Use of Debt Retirement in M&A Transactions to Avoid HSR Filings," Sept. 17, 2021);

- Rescinded Vertical Merger Guidelines put in place by the first Trump administration only in 2020 and deemed too permissive (see, "FTC Sets Ambitious M&A Enforcement Agenda," Sept. 29, 2021);

- Reinstituted a restrictive "prior approval" Merger control review policy for requiring prior approval of transactions by companies that had previously engaged in anticompetitive conduct (see, "FTC Reinstitutes Restrictive "Prior Approval Merger Control Review Policy," Oct. 26, 2021); and

- Launched a joint public inquiry to detect and prevent anticompetitive mergers (see, "FTC and DoJ Launch Effort to Restrict Anticompetitive Mergers," Jan. 24, 2022).

Separately, DoJ Antitrust Division Chief Kanter announced a review of the "efficiencies" rationale, which many M&A parties for years successfully urged that their deals be approved because the merged companies would be more efficient market players for both themselves and their customers, generating

cost savings. Kanter described efficiency arguments as an area in which antitrust policy had diverged from the law.

IV. October 2024 HSR Rule Changes

On October 10, 2024, the FTC unanimously adopted a final rule substantially changing FTC reporting rules and adopting a new HSR reporting form (the "October 10 Final Rule"). The October 10 Final Rule, including the new reporting forms for Acquirer and Target, can be found **Here**. It is important to note that, while the final rule was adopted under the FTC chairmanship of former Chair Khan, then-Commissioner and now FTC Chair Andrew N. Ferguson supported the final rule and issued a concurring statement. In other words, whatever changes in policy towards pre-merger notification and clearance occur during the Trump administration and Ferguson chairmanship, we can expect the October 10 Final Rule to remain in place. With the October 10 Final Rule in effect, the FTC lifted its Khan-era suspension of early termination of HSR filings on the basis that the rule changes allow the FTC, DoJ and other agencies with concurrent jurisdiction to have additional information necessary to make antitrust assessments, allowing early terminations to resume. Among the October 10 Final Rule's changes to the pre-existing HSR regime:

October 10 Final Rule Changes to the Pre-existing HSR Regime

- Updates the HSR Form, the form on which M&A parties report a proposed transaction and start the waiting period running, by enhancing the business operations information that filers must provide.
- Requires separate filings by Acquirer ("Acquiring Person") (Blue Form) and Target ("Acquired Person") (Pink Form).
- Requires disclosure by the M&A parties about subsidies received from certain foreign governments or entities that are economic or strategic threats to the United States pursuant to the Merger Filing Fee Modernization Act of 2022.
- Requires disclosure of additional transaction documents by the head of each M&A parties' deal team

and disclosure of the parties' high-level business plans related to competition.

- Requires disclosure on transaction parties, structure, and transaction details.
- Requires disclosure of existing business lines of each M&A filing party to reveal existing areas of competition between the M&A parties, including for products and services still in development and supply relationships.
- Requires disclosure of investors, including some minority investors, investment funds and those with management rights, and including wherever in the parent-subsidiary chain of Acquirer the investor invests, requiring disclosure of many indirect minority interests in the parties.

V. Deal Points

Deal Point No. 1: Don't fail to report a reportable transaction.

In 2021, the FTC issued a report showing that 94 of 616 studied Big Tech sector M&A transactions between 2010 and 2019 that should have been reported under HSR were not (see, "FTC Sets Ambitious Enforcement Agenda," above, where the report itself can be accessed). 65% of the 616 transactions were between $1 million and $25 million, emphasizing that HSR reporting obligations do not arise only in the largest M&A transactions. 36% used assumption of debt as a structuring device to avoid HSR reporting thresholds, which cash payment would have triggered. Also, more than 79% used deferred or contingent compensation to founders and key employees to avoid paying HSR-triggering Acquisition Consideration. Bottom line: all these techniques to avoid HSR reporting are on the FTC and DoJ radar screen, and parties should make sure that their transactions do not hit the thresholds even if the Acquisition Consideration were paid in cash. New sheriffs are in town - again. Don't fail to report a reportable transaction or rely on financial engineering not to do so.

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About Us

Kurtin PLLC is a New York City-based law firm founded in 2008 and celebrating its 17th anniversary this year. Our practice focuses on corporate, finance, commercial and regulatory representation for both mature and early stage companies, investment funds, investors and lenders in the Biotechnology & Life Sciences, Communications & Media, Information Technologies, Blockchain & Internet, Satellites & Space, and Venture Capital & Private Equity sectors. Among our key values, none rank higher than creative and individualized solutions to business issues, absolute client discretion and unsurpassed responsiveness. Since our founding, we have represented clients in over 40 countries on six continents and across the United States on transactional and dispute resolution matters.

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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.

3. **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.

4. **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.

5. **Asset Purchase Agreement:** the principal document by which an Asset Purchase is effected.

6. **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.

7. **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.

8. **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.

9. **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.

10. **Clayton Act:** Clayton Act of 1914, prohibiting, *inter alia*, M&A transactions that create a monopoly.

11. **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."

12. **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.

13. **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.

14. **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.

15. **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.

16. **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.

17. **DoD:** the U.S. Department of Defense, sometimes colloquially called "the Pentagon."

18. **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.

19. **EBITDA:** Earnings Before Interest, Taxes, Depreciation and Amortization, a common accounting metric of company finances. Also, **EBIT**.

20. **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.

21. **FCC:** the Federal Communications Commission, the U.S. regulator of broadcast, wireless telecommunications, satellite operations and other related activities.

22. **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.

23. **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.

24. **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 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.

25. **FTC:** the Federal Trade Commission the U.S. regulator of antitrust (competition) enforcement and consumer protection.

26. **Hart-Scott-Rodino or HSR:** Hart-Scott-Rodino Antitrust Improvements Act of 1976, and amendment of the Clayton Act, providing for pre-merger notification and clearance of certain M&A transactions.

27. **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, that may be assets of an Acquirer or Target.

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

29. **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.

30. **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.

31. **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.

32. **M&A:** the 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.

33. **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.

34. **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 in a statutory stock-for-stock transaction, 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.

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

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

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

38. **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.

39. **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.

40. **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.

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

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

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

44. **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.

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

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

47. **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.

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

49. **SEC:** the Securities and Exchange Commission, the U.S. regulator of initial issuance and exchange of previously-issued securities.

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

51. **Sherman Antitrust Act: the** Sherman Antitrust Act of 1890.

52. **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.

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

54. **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.

55. **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.

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

57. **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.

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

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

60. **Tender Offer:** An regulated offer to buy all or most of the publicly held shares of a public reporting company; a certain period of time to accept or reject a Tender Offer, which must treat all holders of a company's public float equally.

61. **USPTO:** the U.S. Patent and Trademark Office.

62. **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.