

## MERGERS & ACQUISITIONS 11: INTELLECTUAL PROPERTY ISSUES IN M&A: DEAL POINTS

April 2025

### I. Executive Summary

This is the eleventh of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first ten 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](#)); Mergers & Acquisitions 9: “Financing M&A” ([M&A 9](#)); and Mergers & Acquisitions 10: Antitrust Merger Control and Clearance ([M&A 10](#)), 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 Intellectual Property (IP) issues that can arise in U.S. M&A transactions. 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 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. IP Asset Classes

There are several types of IP that can comprise all or part of a Target's assets:

- Patents are an exclusive and registered right granted by the U.S. Patent and Trademark Office (“USPTO”), an agency of the U.S. federal government, pursuant to the U.S. Constitution, Art. I, s. 8, in an invention, whether a design or a process. A Patent holder has the right to prevent others from replicating, marketing or selling the invention or process without the Patent holder's permission for a set period: 20 years for “utility” Patents (for new and useful process inventions, meaning a method of doing something; and 14 - 15 years for “design” Patents, for new and original designs for products. Patents must be registered by the federal government to be opposable to third parties. Critically, the Patent process or design is fully disclosed to the public in the Patent filing in exchange for which the government grants its exclusionary protection. The protection is legal, not confidentiality.
- Copyrights are an exclusive right for 70 years plus the life of the author to a creative idea embodied in a tangible work, be it a book, video or audio recording, software code or other; unlike Patents, in which the invention, process or design, itself is protected, in Copyright, only the embodiment of the creative idea in tangible form is protected. Although Copyrights arise automatically and can be asserted by the author by affixing a Copyright notice to the work, Copyrights can be registered with the U.S. Copyright Office, part of the Library of Congress.
- Trademarks, a name, logo or Service Mark, indicate a valuable symbol to the public of goodwill and reputation. Like Copyrights, and unlike Patents, trademarks can arise automatically from use, although they may be more provable and therefore better protected by USPTO registration. Trademark infringement arises when a person or company attempts to use the trademark itself or a similar mark to generate confusion between the trademark holder and other trademark-asserting parties. By contrast, a common defense to a trademark infringement claim may be that there is no danger of confusion between the plaintiff's mark and the defendant's mark, because the two parties are in different industries, use the mark in different contexts, and so on.

- Trade Secrets, an industrial or business secret, not registrable with the U.S. federal government, which derives its value from not being publicly known, such as a secret chemical formula or process. Maintaining a process as a Trade Secret is sometimes a strategic alternative to obtaining a Patent for it, particularly because suing for Patent infringement is not only expensive, time-consuming and generally uncertain of success, but can even result in an adverse determination by the court that the Patent should not have been granted in the first place, giving a victory to defendant, the alleged infringer, and invalidating the Patent at the same time. Trade secrets, while not registered by the federal government, can be protected by federal and state law. Unlike Patents and Copyrights, Trade Secrets protect against misappropriation but not against independent discovery by a third party or exclusion from use by the third party without misappropriation. If an independent discoverer of the Coca-Cola or Big Mac special sauce formula could establish that it had independently found the formula, there would be nothing Coca-Cola or McDonalds could do about it.
- Data, which can be either digital or analog information accumulated by a Target that has value and can be conveyed in the M&A transaction, supporting part of the transaction valuation and Acquisition Consideration. “Raw” data itself is not an invention or design, and is not Patentable, nor in and of itself is the expression of an idea and is not Copyrightable. In some circumstances, manipulated or processed data (the origin of the phrase “data processing”) may be considered a Trade Secret, as when (for example) a customer list easily obtainable or compiled from publicly available sources, and therefore raw data in and of itself, is processed by a Target adding information on specific customer needs and likes, purchasing patterns and other information that transforms the raw data of the customer list into one supplemented with the fruits of work applied to it by Target. In the European Union, the 2018 General Data Protection Regulation, or “GDPR,” is an attempt to create controls on personal data of European Union citizens by both “controllers” and “processors” of that data and must be considered in a Cross-border M&A transaction or even U.S. domestic M&A involving EU citizen personal data. Internet IP, which can include domain names, (URLs) and other information registered, given or gleaned from the Internet.

### III. Dealing with IP in M&A Transactions

#### a. Due Diligence.

The identification of Target IP and IP rights is a critical part of Acquirer due diligence. IP, IP registrations and material IP agreements such as licenses and assignments to be included or excluded from the M&A transaction are normally listed in a disclosure schedule or schedules to the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement, as the case may be. Excluded IP and IP rights may be left with a stub end of Target, or conveyed to a third party, including Target shareholders or management. While it is common to list principally registered IP and IP rights such as Patents, Copyrights and trademarks in a disclosure schedule, unregistered IP can also be disclosed, often pursuant to confidentiality provisions in a NDA, and viewable by Acquirer or its agents or advisors under controlled conditions, such as a virtual deal room an Internet-based website with access controls.

One of the first tasks and goals of due diligence in an IP-focused M&A transaction is to assess and value Target's IP portfolio. Target may have a large portfolio of dormant and low-value Patents, trademarks and other IP that have costs to maintain, but little to no value to the Acquirer. Core IP should be identified and valued; valuation of ancillary IP is less critical. It may have value to the Target post-acquisition, if Target is to continue operations, or it may be abandoned, retired or assigned or otherwise conveyed to a third party. Either way, the moment of an M&A transaction is a good time for Target to do Spring cleaning of IP portfolios. Also, as described in the previous section, IP, particularly Patents, but also Copyrights and trademarks, can be challenged not only as to their enforceability in a claim for infringement but as to their validity. Part of the Acquirer's task in conducting due diligence in an M&A transaction is not only assessing the value of the IP itself, but the likelihood of the IP withstanding challenges not only to enforceability, but validity.

#### b. Assignments and Licenses.

Rights to IP are typically conveyed by assignment, which is usually a general conveyance of the IP with limited, if any, reservations of rights by the assignor; or by license, which is a limited (although sometimes nearly unlimited) conveyance of IP rights, limited by time, scope, exclusivity, permitted uses and other factors, with the overall property right remaining with the licensor. In the case of licenses particularly, it is critical to determine the encumbrances on the Target IP, whether the Target is licensee or licensor. While Acquirer due diligence often focuses on Target as licensee of IP, and limits on its

license rights relevant to Acquirer, the effect of license provisions when Target is *licensor* is often overlooked. If, for example, Target has an IP item listed in its disclosure schedule that supports the Target valuation and Acquisition Consideration, it is crucial for Acquirer to know whether Target has granted an exclusive, royalty-free, unlimited in geographic and other scope and duration, license to a third party that might deprive Acquirer substantially or completely of the use and value of that IP after closing.

c. The M&A Agreement.

In an M&A transaction, generally the key elements of dealing with IP are first, assuring that the Target has the right to convey the IP by assignment or license, usually a matter for due diligence by the Acquirer, and then the protection of that assurance in the form of representations, warranties and/or covenants tied to rights of indemnification, termination and conditions to closing in the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement, as the case may be. Depending on the IP license, it may be critical to obtain third-party consent to the assignment of the license by Target to Acquirer.

The M&A agreement should also include a representation that no third party is, or is known to be, infringing the IP or IP rights set forth in the disclosure schedule, and that there is no litigation currently pending or known to be threatened respecting any of Target's IP or IP rights. For example, the M&A agreement will generally provide a representation to Acquirer that Target is not infringing any third-party IP rights, and an indemnification by Target to hold Acquirer harmless for a stated period of time if Acquirer is sued by a third party (except in Mergers, particularly in Public M&A, in which representations and warranties are generally extinguished at closing).

In a Stock Purchase or Merger transaction, the Target's IP is automatically transferred to the Acquirer, unless specifically excluded from the transaction by the Stock Purchase Agreement or Merger Agreement and transferred out of Target prior to closing the transaction. In an Asset Purchase Agreement, IP may be specifically included in or excluded from the assets being conveyed; in fact, treatment of IP may figure in the decision of whether the Asset Purchase is structured as one in which all assets are conveyed unless specifically excluded in a schedule, or the reverse, in which only specifically scheduled assets are conveyed, and those not scheduled are deemed excluded (see [M&A 6](#)).

#### IV. Deal Points

***Deal Point No. 1: Understand the IP's value in the transaction.***

IP's value in a given transaction can vary from negligible to virtually the whole transaction value, and the parties, especially Acquirer, have to understand and value it. Understanding the IP includes not only the original registration or development of the IP, but Target's efforts to maintain and protect it in the time since, the market for which the IP is necessary or relevant, and other factors. As an example only, an item of Target IP, a Patent, for example, could be highly relevant to Target prior to the M&A transaction, but of negligible relevance to Acquirer in the transaction and post-closing, as in the cases of a Patent of limited strategic relevance to Acquirer and not figuring in the principal reasons the Acquirer wants to acquire Target, or a Patent whose invention has been superseded, or a Patent which, though relevant, is shortly to expire, limiting its value to Acquirer, such as a Patented drug that is about to go off-Patent and which will have to compete with generic brands in the future.

***Deal Point No. 2: Make sure that Target has the right to convey the IP in the Transaction.***

The right of Target to convey its IP in the M&A transaction, even if originally developed or registered by it, cannot be assumed. Both licenses in which Target is licensee and licenses in which Target is licensor need to be reviewed to ensure that material IP rights have not been encumbered or lost, potentially materially affecting Target's value or even transaction viability.

***Deal Point No. 3: Provide deal protections for IP in the event of a transaction not closing.***

Unlike stock in a Stock Purchase Transaction or tangible assets in an Asset Purchase transaction, some IP, particularly Trade Secrets, disclosed in an M&A deal is to some extent out of the bag if the deal does not close. For that reason, it is critical, especially on the Target side, to build protections for IP into the transaction for the case in which the deal does not close. In the case of registered IP, the protection comes with the Copyright, Trademark or Patent registration, for which protective covenants can be made part of the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement. In the case of unregistered IP, such as a Trade Secret or a not-Patented invention, an NDA that survives termination, tied to the M&A agreement termination provisions, which will provide for Target's retention of its IP, can provide protection, as can indemnifications for any losses arising from Acquirer's disclosure of IP to

third parties, liquidated damages provisions, injunctive relief rights and others in the case of a busted deal. Additional protections for IP in case of a deal that doesn't close might also include limiting access to the IP by use of a virtual deal room with limited access, limiting access to the details of highly confidential formulae, algorithms and similar cautionary protections.

Owen D. Kurtin

### *About Us*

Kurtin PLLC is a New York City-based law firm founded in 2008 and celebrating its 17<sup>th</sup> 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.

Please visit our website at <https://kurtinlaw.com> and contact us at [info@kurtinlaw.com](mailto:info@kurtinlaw.com) or +1.212.554.3373 for more information on our professional legal services. To subscribe to our publications mailing list, please email [publications@kurtinlaw.com](mailto:publications@kurtinlaw.com) with the message "Subscribe" and your name, company or other professional affiliation and preferred email address.

The materials contained in this advisory have been prepared for general informational purposes only and should not be construed or relied upon as legal advice or a legal opinion on any specific facts and circumstances. The publication and dissemination, including on-line, of these materials and receipt, review, response to or other use of them does not create or constitute an attorney-client relationship.

To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

These materials may contain attorney advertising. Prior results do not guarantee a similar outcome.

Copyright © Kurtin PLLC 2022 - 2025. All Rights Reserved.

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

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

**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, 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 for 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 Acquirer.
- 43. Regulation 14E:** Regulation 14E governs terms and conditions of all Tender Offers, whether by Target, Acquirer 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 Acquirer, 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 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.

**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 Acquirer 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.