

MERGERS & ACQUISITIONS 12: CROSS-BORDER M&A: DEAL POINTS

May 2025

I. Executive Summary

This is the twelfth of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first eleven 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](#)); Mergers & Acquisitions 10: Antitrust Merger Control and Clearance ([M&A 10](#)); and Mergers & Acquisitions 11: Intellectual Property Issues in M&A ([M&A 11](#)), 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 Cross-Border M&A, M&A transactions in which Acquirer and Target are domiciled in different countries. 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 employment and equity-based compensation; 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 Board 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. Cross-Border M&A Paradigms and Issues

Cross-Border M&A, which we'll define here as M&A transactions in which one of Acquirer or Target is a U.S. company and the other is a company domiciled in another country, can be analytically divided into two paradigms: those in which (A) Acquirer is a non-U.S. ("Foreign") company and Target is a U.S. company; and (B) those in which Acquirer is a U.S. company and Target is a Foreign company. There is an additional important overlay depending on whether the parties (particularly Target) are public reporting companies in either the U.S. or Foreign jurisdiction. Also, there are U.S. laws and regulations that apply equally to Cross-Border M&A as in a domestic M&A transaction, and others that apply uniquely in the Cross-Border M&A context. Finally, in Cross-Border M&A transactions, the laws and regulations of the Foreign jurisdiction are always to be considered and are particularly important when Target is the Foreign company. For purposes of this discussion, we will again assume that the U.S. company (whether Acquirer or Target in a given transaction) is a Delaware corporation governed by the DGCL.

- A. Paradigm 1: Foreign Company Acquisition of U.S. Target. Generally speaking, as in U.S. domestic M&A transactions, Cross-Border M&A transactions with a U.S. company Target can be structured as Stock Purchases (*see* [M&A 5](#)), Asset Purchases (*see* [M&A 6](#)) or Mergers (*see* [M&A 7](#)), bearing always in mind that if Target is not a Delaware corporation, its state's corporation law statute must be complied with instead of the DGCL. Often, Foreign Acquirer will form a U.S. Merger Sub or Acquisition Sub to act as acquisition vehicle and use a Forward Triangular or Reverse Triangular structure (Reverse Triangular structures are more common, both to have Target be the Surviving Entity and because the IRS treats Forward Triangular structures as a sale of all of Target's assets to Acquirer or Acquisition Sub/Merger Sub, resulting in higher taxation). The Acquisition Consideration can be in cash, stock, assumed debt or a combination thereof (*see* [M&A 3](#)). When U.S. Target is a public reporting company, most of the Exchange Act regulatory scheme for public companies applies as though the transaction was U.S. Public M&A on both sides (*see* [M&A 8](#)). Foreign Acquirer acquisition of a U.S. public reporting company Target will normally be by One-Step Long Form or Two-Step Short Form Merger (a Tender Offer followed by a Short-Form Merger, assuming at least 90% of Target's equity is tendered) (*see* [M&A 8](#)). U.S. tax and antitrust merger control review and clearance provisions generally apply as in domestic U.S. transactions (*see* [M&A 2](#), [M&A 10](#)), but of

course Acquirer particularly will have to consider its jurisdiction of domicile's tax and antitrust laws and regulations as well.

- B. Paradigm 2: U.S Company Acquisition of Foreign Target. When Target is the Foreign company being acquired by a U.S. Acquirer, the more important law of compliance is the Foreign country law. Even if, as is the case for many Cross-Border M&A transactions, the governing law of the transaction is New York State or the United Kingdom, there are often issues of Foreign law that cannot be waived or varied by the choice of transaction governing law. For example, frequently, Foreign country law will require that Target continue to have at least one local country shareholder post-acquisition, leading to structures in which Acquirer acquires 99% of Target, leaving the remaining 1% in a local nominee shareholder. Also, notice to Target shareholders and obtaining their consent must typically comply with Target country law. Perhaps most well-known, especially in Europe, treatment of and consultation with Target employees, unions and work councils, especially regarding employee layoffs and plant or facility closures, often must be complied with, cannot be waived and are more restrictive regardless of choice of transaction law.

III. Cross-Border M&A Issues

A. Securities Law Issues.

1. Foreign Acquirer/U.S. Target. When a Foreign Acquirer is acquiring a U.S. private company Target, while the Acquirer must comply with its local law to authorize the transaction, the principal Target issue is structuring the transaction in accordance with Target's domiciliary corporate statute, whether the DGCL or otherwise. Although Merger is a more common structure for all Cross-Border transactions, it is possible to conduct a Cross-Border Stock Purchase or Asset Purchase, although Foreign Acquirer may want to form a U.S. Merger Sub or Acquisition Sub to serve as the acquisition or merger vehicle.

By contrast, as with domestic Public M&A, Cross-Border Public M&A is almost always structured as a Merger, usually with a U.S. Merger Sub formed to serve as Acquirer's Merger vehicle, and as either the Surviving Entity or the Merging Entity, depending on whether the transaction is structured as a Forward Triangular Merger or Reverse Triangular Merger (more common, since Target is the Surviving Entity, which is often a structuring goal of the

transaction and to avoid higher taxation from a deemed sale of assets by Target to Acquirer in a Forward Triangular Merger). When a Foreign Acquirer is acquiring a U.S. public reporting company Target, the transaction will usually be structured as either a One-Step, Long Form Merger; or a Two-Step, Tender Offer, Short Form Merger, both as described in [M&A 8](#).

2. U.S. Acquirer/Foreign Target. When Target is the Foreign Company, its corporate and business combination laws must be complied with, as modified (to the extent permitted) by the transaction's choice of law. While U.S. securities laws play a larger role in Foreign Acquirer/U.S. Target Cross-Border Public M&A transactions than in U.S. Acquirer/Foreign Target ones, there is a major U.S. securities law consideration involving Foreign Targets. The U.S. securities laws look through the Foreign domicile of Target to whether Target's shareholders are U.S. persons, and therefore investors that the SEC intends to protect, even though the company they have invested in is Foreign. A two-tier Foreign Target Tender Offer regime established by the SEC applies. Tier I applies when U.S. persons hold less than 10% of the securities for which tender is made. In that case, the transaction is exempt from most of the U.S. domestic Tender Offer rules for notice, disclosure, information provision and others, and any securities issued in the transaction need not be registered under the Securities Act. When U.S. persons hold 10% but less than 40% of the security for which tender is made, the Tender Offer rules generally apply, with some limited exceptions. Above 40%, and the SEC treats the transaction as no different from a domestic Target Tender Offer and subject to the Exchange Act Tender Offer rules and regulations described in [M&A 8](#). Foreign country Tender Offer rules differ from U.S. ones significantly and must be complied with as well. Bear in mind that Tender Offers are intrinsically cash deals, and, presuming compliance with local rules, may significantly simplify the transaction compared to Acquirer stock as Acquisition Consideration.

B. Tax Issues. M&A transactions, including Cross-Border ones, are presumptively taxable under the U.S. Tax Code. Cash as Acquisition Consideration is always taxable and straightforward in both domestic and Cross-Border transactions. However, the Tax Code provides for "tax-free" reorganizations in which, if the Tax Code provisions are strictly followed, no taxable gain or loss is realized by Target or its shareholders and Acquirer or its shareholders on the transaction itself (of course, a taxable event may occur post-transaction, as when, for example, a person or

business that received shares in the transaction later sells those shares). Tax Code §368 sets out these methods, generally known by their §368(a)(1) subsection letters A – G, of which A – D are specifically relevant to M&A transactions and frequently drive or influence transaction structuring. The §368 tax-free reorganizations all require, as a general matter, that there be (i) a continuity of ownership interest, meaning that at least the majority of the Acquisition Consideration or Merger Consideration, the price paid by Acquirer or Acquirer’s shareholders to Target or its shareholders, be in stock, allowing Target’s shareholders’ original investment to notionally continue, and not be cashed out; (ii) a post-acquisition or merger continuation of Target’s business enterprise; and (iii) a valid business purpose for the transaction (i.e., not just tax avoidance). Each A – G subsection’s individual requirements must also be followed to receive tax-free reorganization treatment. The Foreign country’s tax regime and corporation law will also affect overall tax treatment of the transaction, and in some cases may dictate structure of the transaction, including in a manner to deprive the parties of the U.S. tax benefits that would be possible in a fully U.S. domestic transaction.

The 2017 Tax Cuts and Jobs Act (“TCJA”) lowered the maximum 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 minor exceptions, at 30% of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), and 30% of EBIT thereafter, deductibility of interest is less of a transaction-structuring driver than formerly.

The October 2021 Organization for Economic Cooperation and Development (“OECD”)/G20 Inclusive Framework on Base Erosion and Profit Shifting (“BEPS”), joined by 136 of the 140 OECD member countries representing over 90% of global GDP established a minimum 15% corporate tax rate for companies with more than EUR 750 million in revenue (BEPS refers to the tax avoidance strategy of moving profits from higher tax rate jurisdictions to a lower tax rate jurisdiction, impairing the higher rate jurisdiction’s tax base; the OECD global minimum tax rate is designed to eliminate or minimize this “race to the bottom” practice). The new global minimum corporate tax, which started to go into effect in 2024, will also affect corporation v. pass-through, and domestic v. offshore, structuring decisions. For more information, see “*Global Minimum Corporate Tax Rate Agreement Reached,*” available at [Kurtin PLLC Whitepapers and Advisories](#).

- C. Antitrust Issues. Most jurisdictions other than the U.S. that have domiciliary companies involved in M&A transactions with a U.S. company have their own Merger control review and clearance regimes, and those clearances are not necessarily easier to obtain for a given transaction than U.S. clearance. A recent case in point was the U.K.’s Competition and Markets Authority’s (the “CMA”) blocking in the U.K. the \$74 billion acquisition by Microsoft of video gaming company Activision Blizzard in 2023. Neither Microsoft nor Activision are U.K. companies, but the fact that they both did business in the U.K. subjected them to the CMA’s regulatory authority. In the U.S., Section 7 of the Clayton 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, or HSR, requires the parties to acquisitions of any voting securities or assets of the acquired party above certain annually adjusted thresholds to notify the FTC and 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. For more detailed explanation, *see* [M&A 10](#).
- D. Corporate Governance Issues. In the U.S., general corporate governance requirements for M&A are primarily found in the DGCL or other state corporation statutes, and, for public reporting companies, the Exchange Act and the SEC rules and regulations promulgated pursuant to it. In the case, for example, of a One-Step, Long Form Merger, DGCL §251 requires, broadly, that the Board of Directors of each merging corporation must adopt a resolution approving a Merger Agreement. The Merger Agreement must set forth the terms and conditions of the Merger, mode of putting the Merger into effect, changes to be made in the Surviving Entity’s certificate of incorporation, the manner of conversion of shares of the Merging Entities into the Surviving Entity’s shares, and other provisions desired by the merging parties. The Merger Agreement must then be submitted to each merging company’s stockholders at an annual or special meeting for their approval, usually through a proxy statement pursuant to Exchange Act Regulation 14A (*see* Glossary, below). The Merger Agreement and the amended/amended and restated certificate of incorporation of the Surviving Entity or a certificate of merger is filed with the Delaware Secretary of State, and the Merger is complete.

In the case of a Two-Step, Short Form Merger (subject to the Tier I/Tier II regime described in Section III(A)(2) above), the Tender Offer process is specifically provided for by DGCL §251(h) and regulated pursuant to Exchange Act §14(d). Section 251(h) eliminates the need for a shareholder vote required by §251 generally if Target has a class or series of stock is listed on a national securities exchange or has more than 2,000 stockholders of record, provided that the Merger Agreement provides for the Merger closing without a stockholder vote as soon as practicable after conclusion of the Tender Offer. Section 251(h) also provides that the Merger Agreement may set the minimum number or percentage of Target shares to be tendered. Beyond section 251(h), the terms and conditions of Tender Offers are strictly regulated by the Exchange Act and regulations promulgated by the SEC pursuant to the Exchange Act. Other laws and regulations, such as those affecting foreign investment in the U.S. and sensitive technology exports, the Patriot Act of 2001, Dodd-Frank Act of 2010 and the Sarbanes-Oxley Act of 2002 may also impact Cross-Border M&A.

- E. Employment and Social Issues. In the U.S., M&A employment issues may involve negotiating post-closing layoffs, plant and other facility closures, and negotiation of executive compensation packages like stock options and “golden parachutes.” Differing state laws can affect the transaction, as some states, notably California, are more protective of employee rights than others. In other jurisdictions, notably Europe, negotiation with employees, unions, works councils and other entities can be a critical part of the transaction, with layoffs and other terminations sometimes flatly prohibited or requiring resolution in specialized labor courts or in arbitration.

- F. Intellectual Property Issues. 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.

- G. Technology Export Issues: ITAR and EAR. Certain telecommunications and aerospace equipment and components, as well as information security software, including encryption products, are considered to implicate U.S. national security and are therefore subject to export restrictions that can affect or prohibit their ability to be conveyed in an M&A transaction. Where technology export restrictions apply, acquisition of a U.S. company by non-U.S. persons may breach export controls. The scope of restriction depends on relevant Export Administration Regulations (“EAR”) of the U.S. Department of Commerce Bureau of Industry and Security (formerly the Bureau of Export Control) or the International Traffic in Arms Regulations (“ITAR”) of the U.S. Department of State Directorate of Defense Trade Controls. Violations of the EAR and ITAR carry both civil and criminal penalties. Certain technologies, deemed to be vital to national security or anti-terrorism measures, may be completely restricted from export to a short list of countries that the U.S. Government considers to be engaged in state-sponsored terrorism. Others require an individual exporter’s license for export. Even where a license is not required because a general license is already in place, some telecommunications and information technologies are subject to reporting requirements and to governmental review to obtain the necessary export license exemption.
- H. Foreign Investment in the U.S. Issues: CFIUS and FIRRMA. U.S. foreign investment review on national security grounds is conducted by the Committee on Foreign Investment in the U.S. (“CFIUS”), an inter-agency panel chaired by the Secretary of the Treasury and including the Secretaries of State, Defense, Homeland Security, Energy, and Commerce; the Attorney-General, the U.S. Trade Representative, and the Chair of the Council of Economic Advisors. on national security grounds, mergers, acquisitions, and takeovers of U.S. businesses by foreign persons or entities. CFIUS is authorized by the Exon-Florio Act of 1988. The investigation is mandatory when Acquirer is “an entity controlled by or acting on behalf of a foreign government” and when the acquisition could “affect” U.S. national security. The definition does not require majority control by the foreign Acquirer, whether a state or private party; Exon-Florio implicates even minority investments when effective control of the U.S. Target is obtained by the foreign Acquirer. Furthermore, a foreign entity need not be majority-owned by foreign state or private parties to implicate mandatory or discretionary Exon-Florio review if a foreign minority owner has effective control equivalent to majority or veto rights through “golden shares,” classes of shareholder rights, or other minority control devices. Notification to CFIUS

of a potentially implicated, but not mandatory, transaction prior to closing is voluntary but encouraged. CFIUS may also initiate review of a transaction on its own motion either prior to or post-closing. Because transactions *not* reported to CFIUS may be subsequently reviewed at any time and the divestiture sanction imposed without the possibility of judicial review, voluntary Exon-Florio reporting in the early stages of a transaction that would grant effective control to a foreign person, and which may implicate security concerns is sound practice.

The Foreign Investment Risk Review Modernization Act (“FIRRMA”) was enacted in 2018 to expand and reinforce CFIUS’s jurisdiction and modernize its application. FIRRMA expanded CFIUS jurisdiction to include certain non-control transactions – that is, transactions in which the foreign investor did not gain legal or effective control of the U.S. Target. FIRRMA added to the types of CFIUS-covered transactions real estate transactions for properties located proximity to sensitive U.S. government facilities; other investments in certain U.S. businesses that give a foreign person or entity access to material nonpublic technical information in possession of the U.S. business, membership on the U.S. Target’s board of directors, or other decision-making rights; any change in a foreign investor’s rights resulting in foreign control of a U.S. business or “other investment” in certain U.S. businesses; and any other transaction or agreement designed to circumvent CFIUS jurisdiction.

- I. Sanctions Issues. The U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) administers the principal U.S. sanctions regime. OFAC sanctions, for example those placed on Russia in the wake of its annexation of Crimea and invasion of Ukraine, operate to bar sanctioned entities, individuals, and entities controlled by such individuals from investing. If individuals or companies subject to sanctions are the Acquirer or Target, or affiliated with them, the transaction may be blocked by OFAC, or at least divestiture required.
- J. National License Holder Requirements. Certain U.S. Government-issued licenses require the holder to be all- or majority-owned by U.S. persons or entities. In both the U.S. and many non-U.S. jurisdictions, certain sensitive industries such as telecommunications and media, aerospace and defense, food and drugs, and information technologies, are required by domestic law to allow national licenses necessary to engage in those industries to be held by entities whose equity is in whole or in part owned by domestic shareholders. Some regulations have complicated debt and equity “attribution” rules used to assess compliance. A Special Purpose

Vehicle (“SPV”) can be used to isolate such national licenses in a compliant entity, irrespective of the parent business, joint venture, or other structure’s ownership. However, it is necessary to pay attention to the foreign ownership rules involved, since some regimes trace the requisite equity ownership up the corporate hierarchy to the ultimate parent, and whether CFIUS review is required.

- K. Foreign Corrupt Practices Act (“FCPA”) Issues. In many countries particularly outside North America (or at least parts of it) and Western Europe (*ditto*), it is functionally impossible to get a deal done without greasing the palms of government officials, counter-parties, and others. The Foreign Corrupt Practices Act of 1977 establishes a regime of prohibiting bribery of Foreign Party government officials and other parties, which of course can impede or block transactions. FCPA violations can result in criminal and civil penalties and have been enforced with fines in the tens and hundreds of thousands. Other jurisdictions have followed the FCPA’s lead, notably the U.K. with the U.K. Bribery Act, 2010.

IV. Deal Points

Deal Point No. 1: Understand and Respect the Local Country Legal, Regulatory, Political and Cultural Issues in the transaction. In Cross-Border M&A, the importance of political awareness and cultural sensitivity can’t be overstated. The mores of making offers, negotiating, core demands and distinguishing them from things that may be negotiable in exchange are rarely said out loud, and must be known. American-style charging into a boardroom and saying “let’s get down to business” may be viewed disastrously by foreign counterparties. Conversely, styles of developing trust and communication that are critical and often ritualized in other cultures can often seem ritualized and time-wasting to Americans. Knowledge of local current events may be critical; often, for example in a case in which a pending election may be reason to accelerate – or delay – concluding a transaction, the non-U.S. party may be loath to say so openly, leaving it to the Americans to come to the table having informed themselves. Nothing plays worse than Americans who think they are in America when they are not. If possible, learning at least a few words and phrases of greeting in the foreign party’s language almost always plays well.

Deal Point No. 2: Make sure that You Have Necessary Local Country Advisors in the Transaction. The importance of awareness of local legal and regulatory strictures and having qualified local counsel

in the Foreign country cannot be overstated either. Find them, work with them, listen to them, and don't act like an overbearing jerk with them.

Owen D. Kurtin

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.

Please visit our website at <https://kurtinlaw.com> and contact us at 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 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 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. OECD:** the Organization for International Cooperation and Development.
- 39. 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.
- 40. 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.
- 41. 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.
- 42. Regulation 14C:** Regulation 14C is used to furnish similar information to Regulation 14A for transactions in which shareholder approval is not required.
- 43. Regulation 14D:** Regulation 14D prescribes some Tender Offer modalities by an affiliate of the Target or a third party, such as Acquirer.
- 44. Regulation 14E:** Regulation 14E governs terms and conditions of all Tender Offers, whether by Target, Acquirer or another party.

- 45. 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.
- 46. Rule 14d-10:** Rule 14d-10 provides for equal treatment of all Target shareholders in a Tender Offer.
- 47. Rule 13e-4:** Rule 13e-4 governs Tender Offers by Target for its own securities.
- 48. 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.
- 49. Schedule TO:** Schedule TO, the Tender Offer statement, is used to commence a Tender Offer.
- 50. SEC:** the Securities and Exchange Commission, the U.S. regulator of initial issuance and exchange of previously-issued securities.
- 51. Securities Act:** the Securities Act of 1933, as amended, governing initial issuances of securities, both

debt and equity.

- 52. Sherman Antitrust Act:** the Sherman Antitrust Act of 1890.
- 53. 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.
- 54. Stock Purchase Agreement:** the principal document by which a Stock Purchase is effected.
- 55. 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.
- 56. 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.
- 57. Surviving Entity:** the company that continues its corporate existence and operations following a Merger or other M&A transaction.
- 58. 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.
- 59. Tax Code:** the U.S. Internal Revenue Code, 26 U.S.C., as amended.
- 60. TCJA:** the Tax Cut and Jobs Act of 2017.
- 61. 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.

62. USPTO: the U.S. Patent and Trademark Office.

63. 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.