MERGERS & ACQUISITIONS 13: DISTRESSED TARGET M&A: DEAL POINTS

October 2025

I. Executive Summary

This is the thirteenth of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first twelve 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**); Mergers & Acquisitions 11: Intellectual Property Issues in M&A (**M&A 11**); and Mergers &Acquisitions 12: Cross-Border M&A (**M&A 12**), 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 Distressed Target M&A, M&A transactions in which Target is in bankruptcy and therefore under the jurisdiction of the Bankruptcy Court, or insolvent (or nearly so), which does not entail Bankruptcy Court jurisdiction but can change the fiduciary duties of its Board of Directors and other Acquirer and Target considerations. 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; 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. Distressed Target M&A Outside of Bankruptcy

A. Workouts and Restructurings

When a Target company (in this context, the "Debtor") is insolvent or approaching insolvency, the Debor's stakeholders may collaborate to avoid the company filing a petition in bankruptcy. Those stakeholders may include the Debtor's shareholders, officers, directors and creditors, including downstream distributors and customers and upstream vendors and suppliers. The reasons for the stakeholders to try to avoid a bankruptcy filing by Debtor vary from case to case: a lack of competitive alternative suppliers for Debtor's products, avoiding the risk of losing or taking a write-down of existing debt or accounts receivable, a belief that the Debtor can get back to solvency and profitability, and others. Common to all scenarios, however, is the knowledge by all stakeholders that a bankruptcy filing necessarily entails a loss of control over the situation by them; from the moment a bankruptcy petition is filed, a bankruptcy judge or bankruptcy court-appointed trustee has ultimate control over Debtor's fortunes and must approve any attempt to stabilize the company.

The measures taken to prop up an insolvent company can range from forbearance by creditors – agreement to toll the dates on which payment is due, to restructuring of debts – contractually agreeing to extend the maturity of debt obligations, lower interest rates, space out payments, release collateral, convert debt to equity and other measures, to actual debt forgiveness. Forbearance makes the most sense when stakeholders believe that the Debtor's problems are fundamentally short-term and cash flow-related, rather than arising from a structural issue in Debtor's business that short-term forbearance would be unlikely to remedy. Debt restructuring usually makes sense when the stakeholders want to keep the Debtor in business but foresee (and accept) a longer horizon to do so. Debt forgiveness is the most drastic of the foregoing options, and tends to make sense only when the stakeholders, including creditors, need to keep the Debtor in business and traditional restructuring just won't cut it.

Since this is an M&A series, out-of-bankruptcy-court workouts and restructurings can often take the form of sale of one or more Debtor businesses, subsidiaries, or divisions. Often the businesses put on the market are considered by the stakeholders peripheral to the Debtor's core business, the one the stakeholders want or need to keep afloat. These non-core businesses can be attractive to other

buyers, however, and may be offered at fire sale prices. In such as case, the Debtor, as Target or Seller, may raise cash by divesting itself of expendable assets. M&A transactions with a Debtor Target can be structured, like any other M&A transactions, as Stock Purchases, for example in the sale of an entire subsidiary (*see* **M&A 5**); Asset Purchases, for divesting cherry-picked assets (*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, Acquirer will form a 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 Debtor is a public reporting company, the Exchange Act regulatory scheme for public companies applies (*see* **M&A 8**). U.S. tax and antitrust merger control review and clearance provisions generally apply as in ordinary M&A transactions (*see* **M&A 2**, **M&A 10**).

B. Pitfalls

However, there are pitfalls to participation in distressed Target M&A outside of a bankruptcy proceeding:

a. Shift in Directors' and Officers' Fiduciary Duties

When a company is insolvent or nears insolvency, its directors' and officers' fiduciary duties shift from protection of its shareholders to protection of its creditors. The moment of shift is not always easy to define, and may be easily breached by directors and officers more used to fiduciary duties vis-à-vis the company's shareholders.

b. Fraudulent Conveyance Acts

Bankruptcy Code section 548 allows Debtors in bankruptcy to avoid transfers made or debt incurred within two years of the Bankruptcy filing if made with actual intent to "hinder,

delay or defraud creditors" or if the transfer or debt incurrence can "constructively" be deemed to be for less than equivalent value and the Debtor was insolvent at the time of the transfer or debt incurrence or was made insolvent by it. Longer periods of lookback are provided by state fraudulent conveyance statutes, notably New York's, which allows transactions to be set aside up to six years after being made if deemed by actual or constructive intent to have been made with intent to defraud creditors. Such a fraudulent conveyance can include a divestiture, spin-off or other M&A transaction.

c. Securities and Common Law Fraud

Securities and common law fraud remain actionable at any time committed.

d. Bankruptcy Code section 365

If a Debtor enters into an Asset Purchase but then files for Bankruptcy protection before closing it, Debtor may be able to "cherry-pick" assets to include in the sale and those to exclude, leaving Acquirer without the benefit of its bargain.

e. Obtaining Creditor and Shareholder Consents as a Prophylactic Measure

The bottom line is that all stakeholder consents to a transaction with a Debtor must be obtained to avoid later challenges.

III. Distressed Target M&A in Bankruptcy

Once a Debtor files a petition in bankruptcy, the dynamics change from a fundamentally contractual process with a legal/regulatory overlay to a fully court-supervised, regulated process that on the one hand, provides protections for both Debtor and its creditors, but on the other hand, subjects them to court review and approval. There are two principal chapters of the Bankruptcy Code that apply to company Debtors: Chapter 7, or Liquidation; and Chapter 11, or Reorganization. Chapter 7 presumes that the Debtor will be liquidated in a court-supervised manner and its assets distributed to a hierarchy of creditors and equity holders in a manner to make them as whole as possible, after which the Debtor will

cease doing business. Chapter 11 presumes that the Debtor will be reorganized, or restructured, in such a manner that it will continue doing business after emerging from the bankruptcy process. When such a Chapter 11 reorganization is unsuccessful, the bankruptcy proceeding may be converted to Chapter 7, and the Debtor liquidated.

The Bankruptcy Code provides two basic methods for a Debtor to engage in M&A activity as part of a Chapter 11 Reorganization: pursuant to a Chapter 11 Plan of Reorganization; and pursuant to a Bankruptcy Code section 363 sale.

A. Bankruptcy Plans and Sales

In Chapter 11, the Debtor normally prepares and submits a "Plan of Reorganization" that discloses all debts, material contracts and other important data about the company. The Plan is circulated to creditors and other stakeholders, voted upon, and then, assuming the Bankruptcy Court itself does not find anything objectionable in the Plan, such as unfairness to an individual or class of creditors, the Plan is confirmed by the Court.

Increasingly, Chapter 11 Debtors make use of "Prepackaged Bankruptcy Plans," which involve the structuring of the Plan and obtaining of stakeholder consents before the bankruptcy petition is filed. The Prepackaged process has many advantages: speed (compared to a traditional Chapter 11 proceeding), efficiency, the opportunity to negotiate with any dissenting creditors or other stakeholders before a dispute blows up the Chapter 11 proceeding in full view of the Bankruptcy Judge. Assuming the Bankruptcy Judge does not object to the "Prepack Plan" (as they are often called), the Plan can proceed directly to confirmation, enabling a speedy and cost-effective exit from Chapter 11. Functionally the Prepack Plan functions as an out-of-court workout or restructuring, but under the Bankruptcy Court's jurisdiction, in part to impose the restructuring on any dissenting minority creditors.

B. Bankruptcy Plan Sales

Ordinary Reorganization Plans and Prepackaged Plans can also include Stock Purchases, Asset Purchases or Mergers pursuant to Bankruptcy Code section 1129.

C. Section 363 Sales

Bankruptcy Code section 363 provides an alternative in-Bankruptcy Code method for a sale of assets by a bankrupt debtor. Section 363 sales can occur in the Prepack context and allow the Debtor or its Trustee in Bankruptcy to sell assets out of the ordinary course of business (ordinary course of business sales by Debtors in Reorganization do not generally require approval; the whole idea of Chapter 11 is to keep the Debtor in business while reorganizing). Section 363 sales typically require an auction to solicit bids for the assets to be sold to ensure that the highest price possible for the assets can be obtained for the benefit of the Debtor's estate and to be available to pay creditors. Bankruptcy courts have sometimes refused to approve section 363 sales when they found that a "robust" auction process had not been followed to ensure that the highest available price would be obtained. The in-bankruptcy auction is often preceded by a pre-bankruptcy "stalking horse" auction to set a notional floor, or reserve price, for the asset to be auctioned. It is important to realize that a section 363 sale is specifically intended to be the alternative to a Plan sale, and section 363 sales will not be approved if they are deemed to constitute a "sub rosa" Plan that infringes the rights of secured and unsecured creditors. Section 363 sales to Debtor insiders are therefore subjected to heightened scrutiny by bankruptcy courts to ensure fairness to creditors. Similarly, evidence of "collusive bidding" at the auction by prospective asset purchasers can cause a section 363 sale to not be approved.

Section 363 sales are generally faster than Plan sales, even when the Plan is uncontested or prepackaged. The time to auction from approval of auction procedure can be as little as 30 days, and section 363 is therefore a valuable tool for Debtors that need to create liquidity quickly to facilitate their reorganization. The speed of the process also engenders a kind of triage among potential purchasers: assuming other bidders are in play, there is not much point for "window shoppers" to participate; while they are making up their minds about whether to bid seriously or not, the sale is apt to be concluded.

As we mentioned before, section 363 sales also offer buyers the opportunity to "cherry-pick" assets, sometimes even after winning the auction. The buyer, as part of the cherry-picking may assume or reject executory contracts such as leases, services contracts and others. Another advantage to section 363 sales is that, once approved and consummated, they are practically

unreviewable on appeal including for fraudulent transfer claims; were that not the case, buyers would presumably be deterred from participating in them at all to the detriment of the Debtor's bankruptcy estate and reorganization.

Once the public auction is completed, the Asset Purchase is normally consummated with an Asset Purchase Agreement, often abbreviated in representations, warranties and conditions compared to an out-of-bankruptcy Asset Purchase Agreement, given the Acquirer protections already provided by the bankruptcy process. The Bankruptcy Code provides for a 14-day automatic stay from the Bankruptcy Court's entry of the order approving the sale, and in practice many section 363 sales close on the fifteenth day. The Court may sometimes shorten the stay period.

D. Pitfalls

The public auction requirement constitutes a risk for Debtors and would-be purchasers that the sale may not go the way they hoped or expected. It is not unknown for previously undisclosed buyers to bid in at the last minute and upset the expected sale.

A consummated section 363 sale does not insulate the Acquirer from successor liability, a fact that obviously plays a role in what executory contracts Acquirer assumes and which it rejects.

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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 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. **Bankruptcy Code:** the U.S. Bankruptcy Code, 11 U.S.C., as amended.

7. **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.

8. **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.

9. **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.

10. **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.

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

12. **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."

13. **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.

14. **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.

15. **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.

16. **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.

17. **Debtor:** a distressed, insolvent or bankrupt company. In the M&A context, the Debtor is the Target, or Seller, company.

18. **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.

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

20. **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.

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

22. **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.

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

24. **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.

25. **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.

26. **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.

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

28. **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.

29. **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.

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

31. **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.

32. **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.

33. **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.

34. **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.

35. **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.

36. **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.

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

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

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

40. **OECD:** the Organization for International Cooperation and Development.

41. **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.

42. **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.

43. **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.

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

45. **Regulation 14D:** Regulation 14D prescribes some Tender Offer modalities by an affiliate of the Target

or a third party, such as Acquirer.

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

47. **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.

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

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

50. **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.

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

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

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

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

55. **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.

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

57. **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.

58. **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.

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

60. **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.

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

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

63. **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.

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

65. **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.