

## MERGERS & ACQUISITIONS 14: GOING PRIVATE TRANSACTIONS: DEAL POINTS

November 2025

### I. Executive Summary

This is the fourteenth of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first thirteen 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](#)); Mergers & Acquisitions 12: Cross-Border M&A ([M&A 12](#)); and Mergers & Acquisitions 13: Distressed Target M&A ([M&A 13](#)), it is meant to offer to business executives, in-house counsel and their professional advisers an M&A guide concise, accessible and of practical use when embarking on an M&A transaction.

This advisory will focus on “Going Private” transactions, transactions in which a Public Reporting Company Target or “Issuer” or its affiliate (here, “Acquirer”) buys Issuer’s equity securities, and Issuer becomes a private company. Going Private transactions are a common type of leveraged buyout (“LBO”), management buyout (“MBO”) and private equity acquisitions generally. Going Private transactions are subject to more enhanced reporting and disclosure requirements than other Public M&A transactions because of their potential conflicts and unfairness to Issuer shareholders owing to Acquirer’s insider status. All advisories in the series will be available on our website at [Kurtin PLLC Mergers & Acquisitions](#). We will first review the paradigm types of Going Private transactions in Section II, and then in Section III review the structuring of a Going Private transaction. In Section IV, we will review the securities filing requirements of a Going Private transaction, both those common to all Public M&A and those specific to Going Private transactions. Section V has “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*. A progressively cumulative glossary of defined technical terms used will appear at the end of each advisory in the series as Appendix 1.

## II. Types of Going Private Transactions and Reasons for Going Private

Exchange Act Rule 13e-3 sets out three types of Going Private transactions:

- Target's equity securities are acquired by Target or Target's affiliate.
- Target's equity securities are acquired by a Tender Offer by Target or Target's affiliate.
- Target's equity securities are acquired by a proxy or consent solicitation by Target or Target's affiliate in an M&A transaction in which Target's affiliate acquires Target's assets or in a reverse stock split in which affiliate acquires Target fractional shares.

A Going Private transaction occurs when one of these three paradigm transaction types occurs and, as a result of the transaction, a Public Reporting Company Target that was subject to Exchange Act periodic reporting no longer is by reason of having fewer than 300 shareholders or has been delisted from a securities exchange or is no longer quoted on the NASDAQ. In addition, the Acquirer must comply with Exchange Act Rule 13e-3, which will be further discussed in Section IV.

There are two common situations in which Going Private transactions occur. The first type of Going Private transaction is when a Target majority shareholder buys out the shares of minority shareholders. Although this kind of Going Private transaction, known as a "Squeeze-out," can occur with a private company Target, it is generally done with a Public Reporting Company Target as a Going Private transaction.

The second, and better known, type of Going Private transaction is when an affiliate group of a Target company "buys out" the Target's equity. Although, as with Squeeze-Outs, a Buyout can occur with a private company Target, it is also generally done with a Public Reporting Company Target, in which case it is a Going Private transaction. Typically, the affiliate Acquirer uses debt to finance the Buyout acquisition, planning to service and ultimately retire or restructure the debt with the cash flow revenues of the Target, in which case the transaction is known as a "Leveraged Buyout" or "LBO." Often, the Acquirer affiliate group is led by or includes some or all of the existing management of the Target, in which case the transaction is known as a "Management Buyout," or "MBO."

### III. Going Private Transaction Structures

Like other Public M&A, Going Private transactions almost always proceed by Merger, so it will be useful to open and keep handy [M&A 7](#) and [M&A 8](#) as we go. The Exchange Act imposes additional regulatory requirements to those of other Public M&A on Going Private transactions pursuant to Rule 13e-3 to ensure that Acquirer's insider status vis-à-vis Target does not operate to create unfairness or fraud on Target shareholders. Public M&A is usually structured as either a one-step Merger, or a two-step transaction, in which a Tender Offer by Acquirer is made to buy Target shares held by the public for cash, followed by a Merger to acquire Target shares not tendered by the public (a Tender Offer for Target's public float stock in in whole or in part in Acquirer stock instead of cash is an "Exchange Offer").

Mergers are not merely private contracts between legal entities like Stock Purchase and Asset Purchase transactions; Mergers as a transaction structure exist only pursuant to state merger statutes contained in their corporate laws. To effect a legally binding Merger, the parties must comply with the merger statutes of the states in which both Acquirer and Target are domiciled. For purposes of this discussion, we'll again assume that both Acquirer and Target are Delaware corporations and that their Merger will be effected pursuant to DGCL §251, but one or both can be domiciled in other states, or other countries; DGCL §252 governs Mergers between Delaware and "foreign" (non-Delaware) corporations.

#### A. Mergers as Part of One-Step ("Long Form") Public M&A Transactions

Execution of a Long Form Merger pursuant to DGCL §251 requires several steps. Section 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 companies 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 Section IV, 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.

Mergers are statutory stock-for-stock transactions, generally structured as either Fixed Exchange Ratio transactions, in which the number of Target shares to be exchanged for Acquirer shares is fixed and the dollar value of the Merger Consideration (as opposed to Acquisition Consideration) - Acquirer's stock - can rise or fall prior to closing (Fixed Exchange Ratio transactions are usually used in larger "mergers of equals" transactions, as well as transactions in sectors of perceived volatility, since both parties share the risk of movement in Acquirer's share price); or Fixed Value Ratio transactions, in which the dollar value of the Merger Consideration is fixed based on measurement during a negotiated period or an agreed-upon valuation as of a certain date, but the number of Acquirer shares to be exchanged for Target's shares can rise or fall prior to closing, placing the risk of movement in Acquirer's share value or price squarely with Acquirer, since Target/Target shareholders are assured of the same dollar value Merger Consideration (Fixed Value Ratio transactions are more common when one company is clearly the Acquirer and the other company is clearly the Target (see [M&A 3](#), Section III(a)).

#### B. Tax Issues

Public M&A transactions are usually structured as Direct Mergers, Reverse Triangular Mergers, or Forward Triangular Mergers, as discussed and diagrammed in [M&A 7](#), which, when properly structured, qualify for tax-free treatment pursuant to Tax Code §368(a)(1)(A) (see [M&A 2](#)).

#### C. Tender Offers as Part of Two-Step ("Short Form") Public M&A Transactions

The Tender Offer process is specifically provided for by DGCL §251(h) and regulated pursuant to Exchange Act section 14(d). Section 251(h) eliminates the need for a shareholder vote required by section 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, reviewed in Section IV, below.

Tender Offers as part of a two-step transaction are often favored by the parties as a quick way to complete a Merger, compared to issuing a proxy statement pursuant to Regulation 14A (see below). Tender Offers are usually open for 20 days, although they may be extended and must be if the terms of the offer change. DGCL §251(h) requires the acquisition of at least a majority of Target shares to avoid a shareholder vote. However, if the Tender Offer results in Acquiror acquiring at least 90% of Target's equity, the transaction can be closed with a Short Form Merger pursuant to DGCL section 253 as the second step.

By their nature, Tender Offers (unless an Exchange Offer) are cash transactions with each Target shareholder, usually at a premium to Target's market price, making them attractive to most shareholders. Tender Offers ordinarily do not require Target board approval, since they are directed at Target shareholders. For that reason, Tender Offers are also used in hostile takeovers. Tender Offers have a mandatory waiting period of only 15 days, so antitrust pre-merger clearance review is also usually shorter than for a one-step Merger.

#### IV. Going Private Securities Issues and Filings

A. Regulation 14A. 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. Reg. 14A also governs the solicitation of proxies. The proxy statement is a detailed information statement for Target shareholders to decide how to vote on the proposed transaction, including items detailing the securities for which proxies are solicited, directors and officers information, proxy voting procedures and revocability, information on the M&A transaction, financial information and others. If the proxy statement issuer does not require shareholder approval and proxies are not being solicited, it must file an information statement pursuant to Regulation 14C on Schedule 14C that contains similar information to the proxy statement.

B. Regulation 14D. Regulation D prescribes some Tender Offer modalities when the Tender Offer is made by an affiliate of the Target or a third party, such as Acquirer. Among Regulation D's requirements is that the Tender Offer be commenced by filing and distributing to Target shareholders Schedule TO, the Tender Offer statement, containing detailed information about Target, the terms and purposes of the transaction, financial statements and other information, publishing an advertisement about the Tender Offer and mailing the Tender Offer materials themselves to Target shareholders. If

the third party (like Acquiror) uses third parties solicitations or recommendations, it must file Schedule 14D-9, disclosing those third parties and their relationship to the party other than Target making the Tender Offer. Rule 14d-10 requires equal treatment of all Target shareholders in a Tender Offer. All Target shareholders must receive the same consideration for their shares, including shareholders who tendered their shares before the price was raised during the pendency of the Tender Offer. Rule 13e-4 governs Tender Offers by Target for its own securities.

C. Regulation 14E. Regulation 14E and its Schedule 14E govern terms and conditions of all Tender Offers, whether by Target, Acquirer or another party. Among Regulation 14E's requirements are that Tender Offers remain outstanding for 20 business days, subject to extension for 10 days if there is a change in the consideration offered or if the percentage of the securities being solicited changes; that payment for securities tendered must be promptly paid for; and that Target must publish or send to its own shareholders notice of its own recommendation as to their acceptance or rejection of the Tender Offer within 10 days of the Tender Offer beginning.

D. Williams Act. The Williams Act is an amendment to the Exchange Act that requires Acquirer or any investor acquiring more than 5% of Target's stock to file Schedule 13D with the SEC within 5 days of exceeding the 5% threshold. Schedule 13D provides information on the investor, the investor's intentions in making the investment, and how the investment is being financed (source of funds). The 13D information can reveal, for example, if the stock purchase is being made as a Tender Offer prelude to a negotiated acquisition of the Target, a "toehold" investment prior to a planned hostile takeover, or by an activist shareholder seeking greater management control. A Schedule 13D filing therefore conveys valuable information to the Target's board, other shareholders and other market participants, such as other potential acquirors, supposedly in time to respond to market movements, mount a takeover defense or take other action. If the investor does not intend a takeover and is making the investment as a passive investment or in the ordinary course of business, it can instead file Schedule 13G within 5 days.

E. Specific Going Private Securities Filings

Rule 13e-3 prescribes an enhanced disclosure overlay for Going Private transactions to the general Public M&A regime and requires Acquirer to file Schedule 13E-3. The purpose of the Rule is to give Target shareholders a greater basis for assessing whether directors and management are recommending the transaction in contravention of their fiduciary duties. The Rule and Schedule require the Target to affirm that it believes that the transaction is fair to its shareholders and the basis for its belief; whether the transaction is structured to require the approval of a majority of disinterested shareholders; whether the independent directors have retained an independent representative to negotiate for the shareholders; whether the transaction was approved by a majority of disinterested directors; whether the Target has received any opinions, and valuation appraisals or other reports from outside parties related to the transaction.

Schedule 13E-3 must include, among other items, a summary term sheet for the Going Private transaction; the transaction's material terms; a list of past contacts and agreements among the parties; the sources of funds for financing the transaction, Target securities holdings of the filing entity; the purposes and reasons for the transaction; any third party recommendations for or against the transaction; and disclosure of any proxy or other solicitors for the transaction.

Rule 13e-4 governs Tender Offers by Issuer Targets. The Rule requires the Target Issuer or affiliate making the Tender Offer to file Schedule TO, the Tender Offer statement, as provided for by Regulation 14D.

V. Deal Points

***Deal Point No. 1: Tender Offers may be quicker but are more susceptible to third party interference.***

Solicitation of public float shares in a Tender Offer opens the door to competing bidders. If speed is not a premium and third-party interference is feared, a one-step Merger with proxy solicitation of Target shareholders may be more secure.

***Deal Point No. 2: In public M&A, the lack of post-closing deal protection puts a premium on due diligence.***

Due diligence is important in all M&A transactions, but the lack of post-closing deal protections like indemnifications, earn-outs and covenants in Public M&A puts a premium on pre-closing due diligence.

***Deal Point No. 3: Think about the deal signing to closing period when designing Merger Consideration.***

All Public M&A deals are publicly announced in Form 8-K filings and press releases and are therefore subject to market reaction. Merger Consideration parameters like Fixed Exchange Ratios vs. Fixed Value Ratios and protections like Collars, Caps and Floors should be heavily negotiated with the possibility and probability of pre-closing Merger Consideration movements in mind.

***Deal Point No. 4: Take seriously the enhanced disclosure requirements of Going Private transactions and the disclosure required by Schedule 13E-3 and Schedule TO.***

Going Private transactions are more scrupulously scrutinized by the SEC than standard Public M&A transactions. The potential for unfairness to public shareholders requires greater than usual attention to deal terms and third-party appraisals like fairness opinions and supporting valuations.

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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. **Going Private Transaction:** a transaction in which an Acquirer, often a private equity firm, purchases all or a controlling interest in a Public Reporting Company, taking it private in the process, either through a two-step Merger consisting of a Tender Offer followed by a Merger of non-tendering shareholders or a one-step Merger.
29. **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.
30. **Initial Public Offering or IPO:** the process by which a private company offers its shares to the public pursuant to Securities Act section 5 and Regulation C and becomes a Public Reporting Company.
31. **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.
32. **Internal Revenue Service or IRS:** the U.S. federal tax regulatory and enforcement agency.
33. **Issuer:** the company issuer of a debt or equity security, whether Acquirer or Target.
34. **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.

- 35. LBO:** a leveraged buyout, a transaction by which an Acquirer or Acquirer group uses debt to finance the acquisition of the company, often as a Going Private Transaction, usually intending to service and retire or restructure the debt with the cash flow revenues of the acquired company.
- 36. 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.
- 37. 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.
- 38. 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.
- 39. 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.
- 40. MBO:** a management buyout, a transaction by which existing management acquires a controlling interest in a company, often as a Going Private Transaction.

- 41. 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.
- 42. Merger Agreement (or Agreement and Plan of Merger):** a contractual agreement serving as the principal document by which a Merger is effected.
- 43. Merger Consideration:** the Acquisition Consideration in a Merger.
- 44. Merging Entity:** the Merger party that merges into the Surviving Entity and ceases its legal existence.
- 45. OECD:** the Organization for International Cooperation and Development.
- 46. 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.

- 47. 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 to complete the transaction.
- 48. Public Reporting Company:** a company required to file annual, quarterly and other reports with the SEC pursuant to Exchange Act sections 13(d) and 15, either by having offered a class of securities to the public in an IPO or by having registered a class of securities with the SEC.
- 49. Regulation 13D:** Exchange Act Regulation 13D requires any person or group of persons acting in concert, who acquire directly or indirectly more than 5% of a class of any equity security of a Public Reporting Company to file a **Schedule 13D** “Beneficial Ownership Report” with the SEC disclosing the acquisition and the buyer’s intention in making it within 5 business days, and to send a copy to the company. **Schedule 13D** is often used in connection with a **Tender Offer**. Amendments must be filed within 2 business days if more than 10% is acquired, and thereafter quarterly amendments within 45 days of the calendar quarter end if there is a material change to the previously reported information. **Schedule 13G**, an abbreviated version, may be filed in lieu of Schedule 13D by passive investors and qualified institutional investors to assert that the investment was made without intention to take control of the company.
- 50. 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.
- 51. Regulation 14C:** Exchange Act Regulation 14C requires the filing and distribution to Target shareholders of similar information to Regulation 14A for transactions in which shareholder approval is not required on **Schedule 14C**, called an “Information Statement.”
- 52. Regulation 14D:** Regulation 14D prescribes requirements of a Tender Offer made by someone other than the Issuer, such as an Affiliate of the Issuer-Target in a Going Private transaction.

- 53. Regulation 14E:** Regulation 14E governs terms and conditions of all Tender Offers, whether by Issuer-Target, Acquirer or another party.
- 54. 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.
- 55. Rule 14d-10:** Rule 14d-10 provides for equal treatment of all Target shareholders in a Tender Offer.
- 56. Rule 13e-3:** Rule 13e-3 governs Going Private transactions and prescribes the filing of **Schedule 13E-3**.
- 57. Rule 13e-4:** Rule 13e-4 governs Tender Offers or Exchange Offers by Issuers for their own securities and prescribes the filing of **Schedule TO**.
- 58. Schedule 14D-9:** Schedule 14D-9 is used by third parties, such as an Acquirer, that use 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.

- 59. Schedule TO:** Schedule TO, the Tender Offer statement, is used to commence a Tender Offer.
- 60. Securities and Exchange Commission or SEC:** the U.S. regulator of initial issuance and exchange of previously-issued securities.
- 61. Securities Act:** the Securities Act of 1933, as amended, governing initial issuances of securities, both debt and equity.
- 62. Sherman Antitrust Act:** the Sherman Antitrust Act of 1890.
- 63. 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.
- 64. Stock Purchase Agreement:** the principal document by which a Stock Purchase is effected.
- 65. 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.
- 66. 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.
- 67. Surviving Entity:** the company that continues its corporate existence and operations following a Merger or other M&A transaction.
- 68. 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.
- 69. Tax Code:** the U.S. Internal Revenue Code, 26 U.S.C., as amended.

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

**71. 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.

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

**73. 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.