Public mergers and acquisitions in United States: overview

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

The number of announced M&A deals involving US target companies increased from 9,464 in 2013 to 10,547 in 2014. The aggregate deal value for these transactions also increased from US$1.08 trillion to US$1.67 trillion. The number of announced M&A deals involving US acquirer companies increased from 9,760 in 2013 to 10,849 in 2014. The aggregate deal value for these transactions also increased from US$1.08 trillion to US$1.78 trillion. Of the domestic and cross-border transactions announced in 2014, 601 deals with an aggregate value of US$970.0 billion were announced for a US public target company, as compared to 504 deals with an aggregate value of US$409.0 billion in 2013.

Private equity transactions for US targets increased from 2,456 transactions in 2013 to 3,023 transactions in 2014, and the aggregate value of such transactions increased to US$$505.0 billion in 2014, from an aggregate value of US$359.0 billion in 2013.

The sectors showing an increase in activity in terms of total value from 2013 to 2014 were:

- Consumer and retail.
- Energy and power.
- Financials.
- Healthcare.
- High technology.
- Industrials.
- Materials.
- Media and entertainment.

The highest value transactions announced in 2014 included:

- AT&T Inc in the pending US$67 billion acquisition DirecTV Inc.
- Actavis PLC in the US$66 billion acquisition of Allergan Inc.
- Kinder Morgan Inc in the US$58 billion acquisition of the remainder of Kinder Morgan Energy Partners LP.
- Haliburton Company in the US$38 billion pending acquisition of Baker Hughes Inc.
- Reynolds American Inc. in the US$28 billion acquisition of Lorillard Inc.
- Actavis PLC in the US$24 billion acquisition of Forest Laboratories Inc.

(*Source: Thomson Reuters*).

2. What are the main means of obtaining control of a public company?

A public company is a company that has securities registered with the US Securities and Exchange Commission (SEC) (*see box, The regulatory authorities*). It is subject to periodic reporting and other requirements set out in the US Securities Exchange Act of 1934, as amended (Exchange Act). Subject to a limited exemption for non-US companies, the Exchange Act requires a company to register its securities with the SEC if any of the following apply:

- The securities are traded on a national securities exchange.
- The company has both a class of equity with more than 500 owners and more than US$10 million in total assets.
- It has registered an offer of its securities under the US Securities Act of 1933, as amended (Securities Act).

The main means of obtaining control of a public company are through:

- Cash tender offers or exchange offers (that is, a tender offer in which the bidder pays the target's shareholders in securities rather than, or in addition to, cash), commonly followed by a statutory merger.
- One-step statutory mergers under state law (*see Question 12*).

In each case, the acquisition is typically carried out through a wholly-owned subsidiary of the bidder, so that the target becomes a wholly-owned subsidiary of the bidder. In some instances (for example, a merger of equals), an acquisition can be completed:

- Through a direct merger between the bidder and target.
- By the creation of a joint holding company.

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids have been increasingly used in recent years (for further details on how a hostile bid is made, see *Question 12*). However, hostile transactions are still relatively uncommon because they often take longer to complete and have a more uncertain outcome than recommended transactions because of takeover defences and defensive actions (*see Questions 4 and 23*).

In addition, potential bidders may not be comfortable with the limited scope of due diligence in a hostile bid (*see Question 5*). A hostile bid often turns into a recommended transaction before it is completed (for example, Charter Communication's US$55 billion pending acquisition of Time Warner Cable in 2015).

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated and by whom?

Public takeovers, whether by tender offer, merger or other means, are regulated at both the federal (securities and anti-trust laws) and state (corporate law) levels. In addition, industries such as banking, utilities, insurance, airline, media and communications are subject to significant restrictions on investments by both US and non-US persons (*see Question 26*).

Federal laws

The following principal federal regulations govern public takeovers:

- Sections 14(d) and (e) of the Exchange Act, governing tender and exchange offers.
- Section 13(d) of the Exchange Act, requiring the disclosure of an acquisition of 5% of a class of equity in a public company.
- Regulations 14A and 14C of the Exchange Act, governing solicitations of shareholders in proxy contests and consent solicitations (for companies that allow shareholders to act by written consent in lieu of a formal vote at a shareholders' meeting) for the control of a public company's board of directors. A proxy contest usually occurs in the context of a hostile takeover, where the bidder attempts to convince shareholders to use their proxy votes to install new board members and/or management that are open to the takeover.
- Registration requirements of the Securities Act, requiring companies proposing to offer or sell securities to register the securities offered in the transaction, unless an exemption applies.
- Rule 13e-3 of the Exchange Act, regulating public to private transactions in which existing shareholders or affiliates of a company squeeze out its public shareholders.

The SEC usually enforces the federal securities laws and regulations, but opposing parties in a hostile takeover and shareholders can also bring an action on their own behalf. Acquisitions of US companies (or foreign companies with significant US interests) must also comply with the anti-trust filing and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) (*see Question 25*).

State laws

The following principal state laws apply to takeovers (which include both mergers and tender offers):

- **General corporate law.** A merger is governed by the corporate law of the state in which the target is incorporated, which also determines the nature of a director's fiduciary duties when entering into a merger agreement, considering alternative transaction proposals or resisting a hostile takeover attempt.
- **Anti-takeover laws.** A large number of states offer protection from corporate takeovers. The most common types of anti-takeover laws are:
  - **Control share acquisition statutes.** 26 states deny voting rights to a bidder that acquires more than a specified percentage of a target's stock unless the target's shareholders that are unaffiliated with the bidder approve the acquisition;
  - **Business combination or moratorium statutes.** 33 states restrict (often for a limited period of time and typically subject to certain "fair-price" exemptions) a bidder that acquires, without board or unaffiliated shareholder approval, more than a specified percentage of a target's stock from engaging in a merger with the target to force out minority shareholders who did not tender their shares in a tender or exchange offer (a second-step merger);
  - **Fair price statutes.** 27 states prevent a bidder who crosses a specified ownership threshold (usually from 10% to 20%) from engaging in a merger or other business combination with the target unless the bidder either:
    - pays a fair price (often the highest price paid for the target's shares by the bidder during the past two years) in the second-step merger; or
    - before crossing the threshold, obtains approval from the board and/or from a large majority, often two-thirds, of the outstanding shares (a supermajority vote).
  - **Constituency statutes.** 28 states permit a board to consider the interests of other related groups (such as employees, customers, suppliers and communities served by the company) in addition to the interests of the shareholders, in deciding whether to approve a merger or bid; and
  - **Endorsements of defensive action.** 37 states authorise, either by statute or case law, a target's board to defend against a hostile bid, including adopting a shareholders' rights plan (a poison pill) without shareholder approval (*see Question 23*).

The most common jurisdiction for US public companies to be incorporated in is Delaware. Delaware's business combination statute (*Delaware General Corporation Law (DGCL) § 203*) prohibits an acquirer of 15% or more of a company's outstanding stock from engaging, for a three-year period following the acquisition, in any business combination with the company. The prohibition does not apply if any of the following occur:

- The business combination is approved by unaffiliated owners of two-thirds of the outstanding shares.
- The target's board approves either the 15% acquisition or the proposed business combination, in each case before the shareholder acquires the 15% stake.
- On completion of the transaction resulting in the 15% acquisition, the shareholder acquires at least 85% of the target's shares outstanding at the time such transaction commenced.

Application of US rules to offers for non-US companies

The US has historically been aggressive in its application of US securities laws to transactions involving non-US companies. The Exchange Act's tender offer rules fully apply to tender offers for securities involving a target incorporated outside the US if those securities are registered under the Exchange Act, subject to relief from selected provisions depending on the percentage of the foreign target's shares owned by US shareholders. Certain procedural requirements and anti-fraud rules under the Exchange Act apply to all tender offers made to US shareholders, regardless of where the target is incorporated or whether the target has securities registered under the Exchange Act.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

Before contacting a potential target, a bidder conducts preliminary due diligence enquiries by reviewing publicly available information about the target. After contacting the target, and after the parties have signed a confidentiality agreement, the target generally makes non-public information available for the bidder to review. Confidentiality agreements for public targets typically contain a standstill provision, which prevents the bidder from acquiring the target's shares without the target's consent.

A bidder's legal due diligence usually focuses on:

- Contingent liabilities (such as from pending litigation or environmental liabilities).
- Material contracts of the target, including whether those contracts might be affected by the proposed acquisition.
- Employee issues (including employee benefit and pension issues).
- Restrictions on the conduct of the target's business (such as covenants not to compete).
- Anti-trust and other regulatory issues.

A bidder also conducts business, financial, tax and accounting due diligence on the target.

If the target's shareholders are to receive securities from the bidder in the transaction, the target may also undertake a due diligence review of the bidder's business.

The scope of this review is generally dependent on the proportion of the consideration to be paid in securities. In addition, if the bidder is a competitor of the target, due diligence may be limited for confidentiality or regulatory reasons.

Hostile bid

In a hostile bid, the bidder must rely on information about the target that is publicly available.

Public domain

In both recommended and hostile transactions, a bidder conducts due diligence enquiries by reviewing information that is publicly available, which includes:

- Reports filed with the SEC, such as:
  - the target's annual reports on Form 10-K (reporting financial and other information for the fiscal year that can include the target's financing arrangements, stock option plans, executive employment agreements, and other material contracts);
  - quarterly reports on Form 10-Q (reporting financial and other information for the fiscal quarter);
  - current reports on Form 8-K (reporting specified events such as the entry into material contracts within four business days of the occurrence of the event); and
  - proxy statements (containing information on the remuneration of key executives) prepared for the target's annual and special shareholders' meetings.
- Reports filed with the SEC by owners of more than 5% of the target's equity securities, if any (*see Question 4*).
- Information reported by commercial and trade news sources, or available from companies such as Standard & Poor's and Moody's, or on the internet.
- Other public records relating to intellectual property, environmental matters, real estate and litigation.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

While US securities laws do not require a bidder to keep confidential non-public information about a proposed bid, a premature leak in the marketplace could have several negative consequences, such as:

- Increasing the price of the target's shares.
- Prompting competing bids.
- Putting the transaction in the public spotlight, making the deal more difficult to negotiate.

If the target's stock trades irregularly because of acquisition rumours, the relevant stock exchange may require that the target confirm or deny whether it is engaged in negotiations. In addition, if the bidder's or target's stock trades irregularly prior to announcement, the relevant stock exchange may conduct an investigation into potential insider trading.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A bidder commonly requests that significant shareholders and the target's executive officers enter into, concurrently with the signing of the merger agreement, tender or voting agreements obliging them to tender their shares or to vote in favour of the merger. All such agreements and their principal terms must be disclosed in Schedule TO or in the proxy statement (*see Question 14*).

However, arrangements with key shareholders that fully lock up a transaction and preclude the board from pursuing a higher offer may be invalid and unenforceable. For example, a court found an arrangement to be invalid because it included both (*Omnicare v NCS Healthcare (Del. 2003)*):

- A voting agreement in which the majority shareholders agreed irrevocably to vote their shares in favour of a merger.
- A merger agreement that required the merger to be submitted to a vote of the shareholders despite the board's withdrawal of its recommendation of the transaction in light of a higher third party offer.

In contrast, a court held to be acceptable a voting agreement with majority shareholders that required those majority shareholders to vote against any alternative acquisition proposal for 18 months following the proposed transaction (*Orman v Cullman (Del. 2004)*). In that case, the proposed transaction was subject to "majority of the minority approval", which meant that it could not be completed unless a majority of the minority shareholders approved it. The court concluded that these arrangements were enforceable because the completion of the proposed transaction was not a "mathematical certainty".

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply?

Restrictions

US securities laws contain no general restrictions on open market purchases that a bidder can make before announcing a bid, other than the disclosure requirements discussed below and insider trading issues that arise if the bidder has non-public material information about the target. However, purchases should be conducted in a way that avoids them being characterised by the SEC or the courts as a de facto (creeping) tender offer subject to the tender offer provisions of the Exchange Act (including the requirement to pay the same purchase price to all shareholders).

In determining whether purchases constitute a tender offer, the SEC and the courts assess various factors, including whether:

- There was active and widespread solicitation of public shareholders (for example, through public statements or mailings).
- The offer price included a premium.
- The terms of the offer were non-negotiable, with a specified deadline for its acceptance.

Significant pre-bid stakebuilding

Significant pre-bid stakebuilding is likely to be impracticable (and costly if a bid does not succeed) because of the restrictions or disclosure requirements imposed by:

- The HSR Act's anti-trust filing requirements (*see Question 25*).
- State anti-takeover statutes (*see Question 4*).
- The shareholder rights plan (poison pill) of the target (*see Question 23*).
- Anti-takeover provisions in the target's certificate of incorporation (*see Question 23*).
- Industry-specific regulatory restrictions (requiring, for example, notice to, or approval by, the Federal Reserve Board, the Federal Communications Commission, the Federal Energy Regulatory Commission, or state utility, insurance and banking commissions).

In sizeable transactions, long before a bidder reaches the 5% threshold requiring notification to the SEC (*see below*), a bidder building a pre-bid stake is required to make an HSR Act filing, which must be made before acquiring US$76.3 million of voting securities (*see Question 25*).

Disclosure requirements

Any person (or group of persons acting together) acquiring more than 5% of any class of a target's equity securities that is registered with the SEC is required to notify the SEC within ten days of the acquisition (*section 13(d), Exchange Act*). Such person or group must also amend its filing promptly (usually within a day) whenever any material change occurs in the facts set out in that filing. Notification is made in a publicly available filing with the SEC (*Rule 13d-2(a), Exchange Act*).

Certain types of bidder (such as registered broker dealers, banks and other regulated entities), and bidders of up to 20% of a target's securities who, in each case, do not intend to change or influence control of the target, can disclose more limited information with occasionally more lenient filing deadlines (*Rule 13d-1(b), Exchange Act*).

The use of derivative positions to mask stakebuilding may violate the SEC's reporting requirements (*see CSX Corporation v The Children's Investment Fund Management (UK) LLP et al (SDNY 2008)*).

In addition, all transactions in the target's shares that occur during the 60 days before the commencement of a tender offer must be disclosed to the SEC and the target's shareholders, if made by the following:

- The bidder.
- The bidder's affiliates, officers or directors.
- Other related persons.

The large trader reporting rule (*Rule 13h-1, Exchange Act*) was adopted by the SEC in 2011. Under this rule, any person that acquires exchange-listed securities that equal or exceed two million shares or US$20 million during any calendar day, or 20 million shares or US$200 million during any calendar month, must make a Form 13H filing with the SEC.

There is an exemption to the Form 13H requirement if the acquisition of shares is part of a tender offer or merger. However, bidders acquiring a target's securities to gain an initial foothold prior to commencing a tender offer would be subject to this filing requirement.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

Recommended bids are usually carried out through a merger agreement. In a tender or exchange offer, the agreement governs both the offer and the second-step merger (*see Question 12*). The merger agreement specifies the consideration to be paid to the target's shareholders and addresses, among other issues:

- Detailed aspects of the tender or exchange offer (if applicable) and the merger.
- Representations and warranties (which terminate on completion and do not provide any basis for post-completion indemnification).
- Conditions to completion of the transaction.
- "No-shop" or "go-shop" provisions limiting the target board's right to solicit bids from or negotiate with third parties, subject to allowing termination of the agreement if the board must do so to fulfil its fiduciary duties (a fiduciary out) (*see Question 23*).
- Termination provisions and the payment of break fees and reverse break fees (*see Question 10*).
- Covenants relating to, for example:
    - the conduct of business between signing and closing;
    - co-operation in seeking regulatory approvals;
    - the preparation of required SEC filings;
    - the holding of required shareholder meetings of the bidder or the target; and
    - the indemnification of the target's officers and directors.
- The benefits of the target's employees.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

A target often agrees to pay a termination fee to a recommended bidder if the merger agreement is terminated on specified triggering events, such as:

- Where the target's shareholders decline to approve the merger (or to sell their shares pursuant to the tender offer) while a competing proposal is outstanding (often with the additional requirement that some other agreement is reached with another party within a defined period after the termination of the merger agreement).
- The fiduciary out (*see Question 9*).

Numerous courts have upheld termination fees, provided the fee amount is reasonable and does not preclude an alternative transaction. Typically, termination fees range from 2% to 4% of the equity value of the transaction (although a recent Delaware court decision suggests enterprise value may be the appropriate measure in certain cases), with larger transactions mostly at the lower end of this range and smaller transactions at the higher. A 6.3% termination fee is likely to be too high (*Phelps Dodge v Cypress Amex Minerals (Del. Ch. 1999)*).

Other mechanisms have also been used to discourage competing offers and/or to compensate the bidder for its expenses and lost opportunity, including:

- Stock options.
- Commercial arrangements, such as cross licences, asset sales and joint ventures.

Reverse break-up fees (typically ranging from 2% to 7% or more of deal value) have become increasingly used by both private equity and strategic buyers to limit their exposure in the event financing becomes unavailable. These are also payable to the target in certain cases when the transaction is terminated because of the failure to obtain any required regulatory approvals.

Committed funding

11. Is committed funding required before announcing an offer?

There is no legal requirement for a bidder to have committed funding before announcing an offer, although the sources and amount of funds, as well as any material conditions attached to the financing, must be publicly disclosed. However, as a practical matter, targets will often insist that the bidder has committed funding for all or substantial portions of the required funds at the time of the signing of the merger agreement.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

How a bid is made

Cash tender offers. Cash tender offers are subject to certain requirements, including (*sections 14(d) and (e), Exchange Act*):

- **Minimum offer period.** The offer must remain open for at least 20 business days from its commencement date, with certain mandatory extensions for changes to the offer terms or related disclosure materials (*see Question 13*).
- **Withdrawal rights.** The target's shareholders can withdraw tendered shares at any time before the offer's expiry date and at any time after 60 days from the offer's commencement, if the tendered shares have not been purchased.
- **All holders/best price rule.** The terms of the offer (including the price paid) must be the same for all owners of a class of securities. It is accepted practice that, if an offer is made for less than all the shares of a particular class, the bidder will purchase the shares tendered on a pro rata basis.
- **No purchases outside of offer.** The bidder is prohibited, from the first public announcement of the offer until its expiry, from purchasing any of the target's securities except as part of the offer (*see Question 28*).

Exchange offers. Exchange offers are subject to the same rules as cash tender offers. In addition, the bidder must file a registration statement with the SEC that provides information on the bidder, the offer and the securities to be issued to the target's shareholders (*Securities Act*). The offer must remain open until the SEC declares the registration statement effective.

Statutory mergers. A one-step statutory merger is accomplished by entering a merger agreement subject to the approval of the owners of a majority (or a supermajority if required by state law or the target's incorporation documents) of the outstanding shares of the target. In preparation for the shareholders' meeting, the target sends a proxy statement (which is subject to pre-approval by the SEC) to its shareholders.

All holders/best price rule issues

Under the all holders/best price rule (*Rule 14d-10, Exchange Act*), the consideration paid to any shareholder for securities tendered in a tender or exchange offer must be the highest consideration paid to any shareholder for securities tendered in such offer, and all shareholders must have an equal right to elect the type of consideration from among those offered.

In contrast, structuring an acquisition as a one-step merger may allow a bidder to offer different forms of consideration to different shareholders.

There is a specific exemption from the all holders/best price rule for amounts offered or paid in accordance with employment compensation, severance or other employee benefit arrangements so long as such amounts are both:

- Paid or granted as compensation for past services performed, future services to be performed, or future services to be refrained from performing, by the shareholder.
- Not calculated based on the number of securities tendered or to be tendered in the tender offer by the shareholder.

In addition, there is a non-exclusive safe harbour for employment compensation, severance or other employee benefit arrangements that are approved by the compensation committee (or similar committee of independent directors) of the target or, if the bidder is a party to the arrangements, of the bidder.

Announcing the bid

Once a merger agreement has been executed, the bidder and target issue a press release announcing the agreement and stating that either:

- The bidder will commence a tender or exchange offer.
- The target will solicit proxies for approval of a one-step merger.

The press release, often made jointly, describes the material terms of the transaction.

Commencement of an offer

In a recommended transaction, a tender or exchange offer commences as soon as practicable (often within a week) after the execution of the merger agreement by the publication of a half-page summary advertisement, describing the key terms of the offer and complying with SEC rules, in a daily national newspaper (usually *The Wall Street Journal*). As soon as practicable on the date of commencement, the bidder must deliver a Schedule TO (the principal disclosure document for a tender offer (*see Question 14*)) to the:

- SEC.
- Target.
- Stock exchange on which the target's shares are traded.

While the bidder is only required to provide the offer to purchase (*see Question 14*) to the target's shareholders that request it, the bidder usually mails this document to all of the target's shareholders on the date of commencement of the offer.

Limited duty to disclose negotiations

A company does not have a general duty to disclose material non-public facts or corporate developments, including the existence of merger negotiations. However, under the basic anti-fraud provision of the Exchange Act, a company is required to disclose merger negotiations that it deems to be material if any of the following apply (*Rule 10b-5*):

- The company trades in its own securities.
- The company leaks the details of negotiations into the market.
- Disclosure is necessary to correct previous misstatements and to correct statements, which, although correct when made, become incorrect over time or from subsequent events.

In addition, the stock exchange or market on which the parties are listed may require disclosure when rumours or unusual market activity indicate that the confidentiality of merger negotiations can no longer be maintained (*see section 2.02, New York Stock Exchange (NYSE) Listed Company Manual and Rule IM 4120-1, NASD Manual*).

While there is no obligation of continuous disclosure, most US public companies are often filing, or preparing to file, disclosure documents required by the Securities Act or Exchange Act and engage in a constant evaluation of whether merger negotiations should be disclosed to ensure the accuracy of those filings. Merger negotiations should be disclosed if they are material to investors based on:

- The likelihood that the proposed transaction will occur.
- The magnitude of the proposed transaction.

Hostile bids

A hostile bid is usually structured as a tender or exchange offer, often accompanied by a proxy contest in which the bidder attempts to convince the target's shareholders to replace the target's incumbent directors with the bidder's nominees at an annual or special meeting. Once the bidder's directors are in place, any takeover defence can be dismantled, including redemption of the shareholder rights plan (poison pill) of the target. If the target has a staggered board with, in most cases, only one-third of the directors elected at each annual meeting, a proxy contest, which would take two or more years to win, may be impracticable.

Hostile offers are initiated in one of the following ways:

- The bidder can deliver a private letter (which the target can choose to disclose) containing a preliminary offer to acquire the target (bear hug letter).
- The bidder can announce the offer through a public bear hug letter notifying the target and its shareholders (through a press release) of its intention to make an offer at a specified price and requesting negotiation.
- If the bidder acquired more than 5% of the target's equity securities, the bidder must make a filing with the SEC disclosing this fact (*see Question 8*). The bidder must include any plans it has to acquire additional target shares, change the target's board or engage in a business combination transaction with the target (among other things) (*Schedule 13D, Exchange Act*).
- The bidder can appeal directly to the shareholders by immediately commencing a tender or exchange offer.

Timetable

The timetable for acquiring a public company varies depending on, among other factors:

- The acquisition structure.
- Whether the transaction is recommended or hostile.
- Whether any special regulatory or jurisdictional rules apply.
- Tactical considerations.

Cash tender offers

In the absence of regulatory approvals or other restrictions, a cash tender offer is generally the quickest way to acquire control of a public company, primarily because the offer documents are not subject to the SEC's prior review. In cash tender offers, SEC review of the offer documents occurs after the commencement of the offer, and typically does not result in any extension of the offer.

In a recommended transaction, a cash tender offer can commence shortly (usually within a week) after the execution of the merger agreement and can often be completed within five or six weeks. A cash tender offer must remain open for at least 20 business days from the date on which the summary advertisement is published and the Schedule TO is filed with the SEC. The offer must be left open for at least ten business days (and for an additional five business days following any other material change) after any change:

- In the number of shares being sought (including a change to the minimum number of shares sought).
- In the consideration being offered.
- That is similarly significant.

Such changes must be filed with the SEC and disclosed (usually by press release) to the target's shareholders.

Within ten business days of an offer's commencement, the target must deliver to its shareholders a statement of whether the target's board recommends acceptance or rejection of the offer, remains neutral, or is unable to take a position. In a recommended transaction, the target's statement is usually mailed with the offer to purchase to the target's shareholders.

Bidders can elect to accept tenders after their initial offer is completed, during a subsequent offering period of at least three business days, provided that, among other conditions:

- The initial offer period of at least 20 business days has expired.
- The offer is for all of the target's outstanding shares.
- The bidder promptly pays for all securities tendered during the initial offer period.
- The bidder announces the results of the tender offer no later than 9am on the next business day after the expiry of the initial offer and immediately begins the subsequent offering period.
- The bidder offers the same form and amount of consideration in both the initial and the subsequent offering period.
- The bidder immediately accepts and promptly pays for all shares as they are tendered during the subsequent offering period.

Bidders sometimes use subsequent offering periods or a "top-up option" (an option to acquire newly issued shares of the target) to reach the threshold required to carry out a short-form merger (*see below*).

If the offer is successful, the bidder completes a second-step merger to acquire the remaining target shares. If the bidder is able to acquire a sufficient number of shares (typically 90% in most states, although a simple majority may also be sufficient in Delaware (*see below*) in the offer (or pursuant to a subsequent offering period or upon exercise of a top-up option), the bidder may complete a short-form merger, which does not require a shareholder meeting, promptly following completion of the offer.

Pursuant to a 2013 amendment to the Delaware General Corporation Law (DGCL), in certain circumstances a bidder may effect a short-form second step merger (without a shareholder's meeting) if, following the first step tender offer, the bidder holds sufficient shares to approve the merger under the target's certificate of incorporation (for example, a majority of the outstanding shares). To be eligible for the short-form second step merger the parties must, among other things, include a provision in the merger agreement expressly stipulating that the merger will be governed by the relevant section of the DGCL.

Otherwise, unless the target's certificate of incorporation permits shareholder action by written consent, a shareholders' meeting is required to approve a second-step, long-form merger (requiring majority or supermajority shareholder approval, depending on state law or the target's organisational documents).

Exchange offers

An exchange offer is generally subject to the same minimum offering and mandatory extension rules as a cash tender offer, with the additional requirement that the offer must remain open until the SEC declares the registration statement effective. As the preparation of a registration statement can be burdensome, the timing for an exchange offer is often significantly longer than for a cash tender offer. An exchange offer typically also adds several weeks to the cash tender offer's timetable because it requires registration of the securities to be issued and may require approval by the bidder's shareholders, if either:

- Securities constituting more than 20% of a class of securities (calculated on a pre-issuance basis) listed on the NYSE or Nasdaq are to be issued as consideration.
- An amendment to the bidder's incorporation documents is necessary to increase the number of authorised shares.

One-step mergers

In the absence of any regulatory approvals or other restrictions, a one-step merger usually takes significantly longer to acquire control of a target than a cash tender offer because the SEC must clear the proxy statement before it can be mailed to the target's shareholders. Additional delay can result if the offer requires the issuance of more than 20% of a class of the bidder's securities listed on the NYSE or Nasdaq or an amendment to the bidders's incorporation documents, which each require shareholder approval. This delay may be irrelevant if a lengthy regulatory or anti-trust approval process is expected.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

A tender or exchange offer by a bidder is accepted by the target's shareholders when they tender their shares. At that point, the bidder must purchase the tendered target shares at the offered price, subject only to the satisfaction of the offer conditions, which commonly include:

- **Minimum tender/shareholder approval.** This requires (in a tender or exchange offer) a minimum number of target shares (usually the number required to complete the second-step merger) to have been tendered or (in a merger) the necessary shareholder approval to have been obtained. Bidders frequently use this type of condition to ensure that they are not obliged to purchase less than a controlling stake in a target.
- **Material adverse effect.** This requires that no event has occurred, between the announcement of the offer or signing of a merger agreement and the time at which the bidder is to purchase the shares or complete the transaction, that is likely to have a material adverse effect on the target.
- **Merger agreement compliance.** This requires the target not to have breached its representations, warranties or covenants in the merger agreement.
- **Regulatory approval.** This requires all necessary anti-trust approvals (*see Question 25*) and other regulatory approvals to have been obtained.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

Tender and exchange offers

A tender or exchange offer (hostile or recommended) involves the following documents:

- A Schedule TO, which is filed with the SEC and which generally incorporates information by reference to an offer to purchase.
- An offer to purchase, which sets out the terms of the transaction and is the primary disclosure document provided to the target's shareholders. The offer to purchase includes information on:
  - the identity and background of the parties;
  - previous dealings between the parties;
  - the bidder's plans or proposals concerning the target;
  - the source and amount of the bidder's funds, including a summary of financing arrangements; and
  - audited financial statements of the bidder for the most recent two (for all-cash offers) or three (if securities are offered) years, unless the bidder's financial condition is not material to the target's shareholders (for example, in a purely cash offer for all outstanding shares that is not subject to a financing condition).
- A letter of transmittal and other documents providing instructions and means for tendering shares.
- A Schedule 14D-9, which is prepared by the target and sets out the target board's position in relation to the offer.

In an exchange offer, the bidder also prepares a registration statement on Form S-4 (for US companies) or Form F-4 (for non-US companies) containing a prospectus with additional disclosures, including:

- A business description of both companies.
- A description of the bidder's securities.
- Audited financial statements of the bidder and, if the acquisition is material to the bidder, the target.

If financial statements of the target are required, pro-forma financial statements are also required.

If a bidder's financial statements are required, bidders with non-US Generally Accepted Accounting Principles (GAAP) or IFRS financial statements must reconcile their existing financial statements to US-GAAP or IFRS, often substantially delaying an offer. In addition, if the bidder and target use different accounting principles, the preparation of any required pro-forma financial statements may be delayed.

Statutory mergers

In a one-step merger, the target delivers to each shareholder a proxy statement and proxy card (the written power of attorney to be signed by the shareholder authorising a specific vote on its behalf) before the shareholders' meeting. The proxy statement, which also serves as a prospectus if the bidder is issuing securities, is the primary disclosure document filed with the SEC in connection with a merger and includes much of the same information contained in an offer to purchase (*see above, Tender and exchange offers*).

In a second-step merger, if the bidder has already acquired sufficient voting power to guarantee the outcome of the vote, it can choose to make the target send to the shareholders only a short-form information statement (rather than a proxy statement soliciting proxies) concerning the merger.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There is no requirement for the board to consult employees.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

Usually, if a bidder has acquired a significant stake in a company and has no intention of increasing its stake, it is not obliged to make an offer for the remaining shares. However, three states (Maine, Pennsylvania and South Dakota) have "control share cash-out" provisions, under which the other shareholders can demand that the bidder purchase their shares at a fair price if a bidder gains voting power of a certain percentage of a company (20% in Pennsylvania; 25% in Maine; 50% in South Dakota).

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

While there are essentially no limitations imposed on the type of consideration that a bidder can offer in a public takeover (*DGCL § 251*), the forms of consideration that are commonly used in public takeovers include cash, securities or both.

A bidder offering both cash and securities can allocate the consideration among the target's shareholders by either:

- The straight pro rata method.
- More commonly, through a cash election, which allows the target's shareholders to choose between the types of consideration, with limits on the maximum amounts of cash or securities to be issued (if one of the components is oversubscribed, it is typically allocated on a pro rata basis).

Choice of consideration

In selecting the consideration to be offered, a bidder's analysis focuses on:

- Its financial resources.
- The expected dilution to its outstanding shares (and potential effect on their market price) if securities are issued.
- The preference of the target's shareholders as to the form of consideration.

In addition, a bidder's choice will be influenced by corporate and securities law considerations and by regulatory concerns.

A non-US bidder often has additional considerations which mitigate against offering securities as consideration, including:

- Delay (or perhaps insurmountable difficulties, especially for a hostile bid) resulting from the process for registering securities issued in an exchange offer.
- Reporting obligations under the US securities laws that accompany having securities registered under the Exchange Act.
- Insufficient liquidity in the US trading market for the bidder's securities.

Tax

The consideration offered by a bidder determines whether the acquisition can qualify, in whole or in part, as a tax-free transaction to the target's shareholders under the US Internal Revenue Code of 1986, as amended (IRC). Generally, an exchange of stock of one company for stock of a second company is tax-free to the target's shareholders if the transaction qualifies as a "reorganisation" under section 368 of the IRC (reorganisation) or a transfer to a controlled corporation under section 351 of the IRC (IRC 351 transaction).

To qualify as a reorganisation, a transaction must satisfy several requirements. In particular, a sufficient amount of the aggregate consideration (varying from about 40% to 100% of the consideration, depending on the type of reorganisation) paid to the target's shareholders must be stock of the bidder or its immediate parent company and, in certain reorganisations, the stock must be voting stock. In the event that a transaction fails to qualify as a reorganisation, the bidder's acquisition of the target can still be treated as a tax-free transaction to the extent the transaction qualifies as an IRC 351 transaction.

To qualify as an IRC 351 transaction, persons must transfer property (such as target shares) to a company, and those persons, in the aggregate, must own at least 80% of the total voting power and 80% of the shares of each class of non-voting stock of such company immediately after the transfers. A typical structure used by bidders to achieve tax-free treatment in a transaction that otherwise fails to qualify as a reorganisation involves both:

- The organisation of a new holding company (holdco).
- The transfer of bidder and target stock to holdco in exchange for holdco stock.

The shareholders of the bidder and the target that transfer their shares to holdco are treated as a "transferor group" so that the transaction can be treated as a tax-free IRC 351 transaction.

If a transaction qualifies under sections 351 or 368 of the IRC, a target's shareholder defers the gain in its shares until the shareholder disposes, in a taxable transaction, of the stock received. However, if the target's shareholder receives cash or other non-stock consideration (boot) in the reorganisation or IRC 351 transaction, the shareholder must recognise gain (if any) to the extent of the boot received. Additionally, "non-qualified preferred stock" (generally redeemable preferred stock for which there is not a real and meaningful likelihood of participation in corporate growth of the target) is treated the same as cash and, therefore, is taxable to a recipient shareholder. Certain transfers intended to qualify as IRC 351 transactions or reorganisations that are made to a non-US corporation may be treated as taxable transactions.

Timing

All-cash offers generally close more quickly than offers that include securities in the consideration (*see Question 12*).

18. Are there any regulations that provide for a minimum level of consideration?

Generally, there is no requirement to offer a minimum level of consideration. However, the all holders/best price rule (*see Question 12*) requires the consideration to be paid in a cash tender or exchange offer to be the same for all owners of an identical class of securities. Additionally, in some states, "fair price" anti-takeover statutes (*see Question 4*) require a bidder to pay equivalent consideration to shareholders in both the tender offer and the squeeze-out merger of a two-step bid, deterring coercive two-tier, front-end loaded offers.

Depending on state law, the target's shareholders who do not tender their shares in a cash tender offer (in the case of a two-step transaction, that is, a tender offer followed by a second-step merger) and who do not vote in favour of a merger, may be entitled to appraisal rights. On following certain procedural requirements, a target shareholder is entitled to a cash payment from the bidder equal to the value of its shares as determined by a court, which may be higher or lower than the amount offered by the bidder. As appraisal proceedings can take years to complete and their outcome is uncertain, appraisal rights are rarely exercised.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no restrictions on the form of consideration that a foreign bidder can offer to shareholders. However, when a non-US company uses its own shares as consideration to acquire a public company in the US, the bidder is subject to the registration requirements of the Securities Act, unless an exemption applies. If the non-US company's shares are not already registered under the Securities Act, preparing for registration could substantially delay the acquisition. In addition, non-US bidders often offer securities in the US in the form of American Depositary Shares (shares issued under a depositary agreement representing the underlying shares of a foreign issuer that trade in the issuer's home market).

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

In a long-form merger, all of the target's shareholders are bought out and, directly or indirectly, the bidder becomes the target's sole shareholder.

In contrast, a tender or exchange offer, even if successful, invariably leaves a bidder with minority shareholders in the target.

While there is no compulsory offer mechanism in the US, a bidder can use a second-step merger (*see Question 12*) to buy out the remaining minority shareholders. On completion of the merger, all of the target's shareholders who did not sell their shares to the buyer in the tender offer are bought out and the bidder becomes the target's sole shareholder.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

In some states, statutory freeze-out provisions require a bidder that surpasses a certain ownership threshold in a company (usually between 10% and 20%) to wait a specified period of time before gaining control of the company. Currently, 33 states have adopted freeze-out provisions, with freeze-out periods ranging from two to five years. Trigger thresholds vary from 5% in Massachusetts to 25% in Maine.

De-listing

22. What action is required to de-list a company?

Under SEC rules for de-listing securities from a national securities exchange (such as the NYSE) that became effective in April 2006, either the company or the relevant stock exchange (generally for violation of the exchange's rules) can initiate a de-listing by filing a Form 25 with the SEC. The de-listing becomes effective ten days after the Form 25 is filed, and the company's withdrawal from section 12(b) registration under the Exchange Act will take effect 90 days after that filing.

In the case of the company-initiated de-listing, the company must certify that it has complied with all applicable state laws and exchange rules governing the de-listing of its securities. The company must also notify the exchange in writing at least ten days before filing the Form 25, contemporaneously issue a press release announcing the de-listing, and post the notice on its website.

In the case of an exchange-initiated de-listing, the exchange must, in addition to filing the Form 25, provide:

- Notice to the company of the proposed de-listing.
- Opportunity for appeal to the exchange's board of directors.
- Public notice of the exchange's determination to de-list the securities at least ten days before it becomes effective.

To terminate the target's periodic reporting and other obligations under the Exchange Act, a separate filing to de-register must be made to the SEC. Otherwise, a de-listed company may retain its status as a registered issuer for the purposes of the Exchange Act and continue to be considered a public company (*see Question 2*).

If a company's securities meet certain criteria (for example, if the securities are held by less than 300 persons or, if the company's total assets have not exceeded US$10 million on the last day of the issuer's three most recent fiscal years, 500 persons), a company's filing obligations in relation to those securities under the Exchange Act can be suspended immediately on filing with the SEC a certificate of termination on Form 15. In 2007, the SEC adopted amendments to the rules governing the de-registration process, including the introduction of new de-registration criteria based on the average daily trading volume of a foreign company's shares in the US, which make it substantially easier for non-US companies to terminate their obligations under the Exchange Act.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Subject to its fiduciary duties, a target board has many defences available to it. The most common defences include:

- Adopting a shareholder rights plan (poison pill) allowing the issuance of rights to the target's shareholders to acquire additional securities in the target or the bidder at a below-market price on certain trigger events, thereby diluting the voting power of the bidder in the target's shares or diluting the bidder's shareholders.
- Adopting defensive provisions in the company's certificate of incorporation or bye-laws, such as:
  - staggered terms for directors;
  - prohibitions on removing directors without cause; and
  - limitations on shareholders' ability to call meetings or to act by written consent.

  These provisions are usually implemented by shareholder vote and often require a supermajority shareholder vote to be amended or repealed.
- Implementing a regulatory strategy to persuade anti-trust or industry regulators that the bidder's transaction would have a negative impact on consumers.
- Altering the company's capital structure in a recapitalisation by exchanging its shares for a substantial cash payment, a debt instrument or preferred stock.
- Offering to purchase some of the target's shares at a premium to the hostile bidder's offer through a self-tender or share repurchase plan.
- Seeking a more favourably-viewed bidder with whom to negotiate a pre-emptive sale of the target (white knight).
- Seeking a recommended investor to whom a target can sell a large block of stock (white squire).
- Organising a defence to acquire the hostile bidder before it can acquire the target (Pac-Man defence).
- Making an acquisition (with leverage) to increase the acquisition costs to the hostile bidder or to present it with anti-trust problems.
- Initiating litigation (alleging, for example, violations of anti-trust and/or securities law) to restrain the bidder while a white knight is sought or other defences are initiated.

A target board's ability to take defensive measures is limited by the directors' fiduciary duties under state law. The judicial doctrine known as the business judgment rule generally protects a board of directors from liability for its actions if it acts:

- On an informed basis.
- In good faith.
- In the honest belief that the action was in the best interests of the company.

However, the standard of review in a hostile bid, which varies between states, can be more rigorous. In Delaware, for example, when defensive actions are taken, the board faces a higher level of scrutiny, requiring that the defensive actions be "reasonable in relation to the threat posed" (*Unocal v Mesa Petroleum (Del. 1985)*). In addition, Delaware law states that, in connection with the break-up or sale of control of a company, a board's overriding duty is to maximise the near-term value realised by shareholders (*Revlon v MacAndrews & Forbes Holdings (Del. 1985)*).

Despite the higher standard of scrutiny of defensive actions, a target board's ability to preserve a company's independence in the face of a hostile bid was strengthened by a 2011 decision of the Delaware Court of Chancery (*Air Products & Chemicals, Inc v Airgas, Inc (Del. Ch. 2011)*), which indicates that the board of a Delaware company can "just say no" and refuse to negotiate with a bidder or withdraw its poison pill if it believes that the bidder's proposal undervalues the company.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

The federal government does not impose transfer duties on the sale of shares in a company incorporated and/or listed in the US. Sales or other transfer taxes, including real property transfer taxes, may be payable, subject to defined exceptions, under the laws of a particular state or locality.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Public takeovers are subject to notification and other requirements under the US anti-trust laws.

Thresholds for investigation

While US anti-trust authorities can investigate any merger or acquisition, only transactions that meet the requirements of the HSR Act require notification to the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ). Unless the parties qualify for an exemption, the HSR Act requires notification of acquisitions of voting securities, non-corporate interests or assets if all of the following criteria are met:

- At least one of the parties is engaged in an activity affecting US commerce.
- As a result of the acquisition, the bidder would own any combination of voting securities, non-corporate interests and assets of the target with an aggregate value above US$76.3 million.
- In cases where the transaction is valued between US$76.3 million and US$305.1 million, the size of the parties satisfies certain threshold requirements.
- In cases where the transaction is valued over US$305.1 million.

Notification

Pre-merger notification is mandatory if the filing thresholds are triggered unless an exemption applies.

Substantive test

Mergers and acquisitions whose effect may be substantially to lessen competition, or to tend to create a monopoly, are prohibited (*section 7, Clayton Act of 1914, as amended*). Transactions can also be challenged under section 1 or 2 of the Sherman Antitrust Act of 1890 (as amended) or section 5 of the Federal Trade Commission Act of 1914 (as amended). Generally, in assessing whether a transaction will substantially lessen competition, the government considers whether, in any relevant market, the transaction is likely to result in either:

- Prices that are higher than they would be in the absence of the transaction.
- A decrease in the level of product quality or customer service.
- A decrease in the rate of technological innovation.

Time limits and obligation to suspend

If a transaction is subject to the HSR Act, the parties cannot close the transaction before the applicable waiting period expires or terminates early. The initial waiting period for most transactions is 30 calendar days, beginning on the day after the FTC and DOJ receive notification and ending on the 30th day after that date. The initial waiting period for all-cash tender offers and certain insolvency transactions is 15 calendar days.

The waiting period generally begins after both parties make their HSR filings. In all-cash tender offers and other acquisitions of voting securities from third parties, the waiting period begins when the FTC and DOJ receive the HSR filing from the acquiring party. The parties can request early termination of the HSR waiting period, which allows the agencies to exercise their discretion to terminate the waiting period before it expires.

The FTC or the DOJ can extend the initial waiting period by making a second request for the submission of additional information and documentary material from a person filing a notification. This automatically extends the waiting period by an additional 30-calendar-day period (or ten days in the case of all-cash tender offers and insolvency transactions) that only begins to run following the receipt of the requested additional information and documentary material. At the end of the second waiting period, the parties are free to close the transaction unless the investigating agency obtains an injunction in a federal district court blocking the transaction. Investigations that proceed to the second request stage can often take up to six months or more to be resolved.

In addition to the anti-trust rules, public takeovers in industries such as banking, utilities, insurance and communications may be subject to approval by one or more regulating agencies.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

Although there are no general restrictions on foreign ownership of shares, the Exon-Florio Amendment (as amended by the Foreign Investment and National Security Act 2007) (FINSA) permits the US President to decide on a case-by-case basis, whether (for national security reasons) to block, unwind or make subject to certain conditions, acquisitions of and mergers with US businesses by foreign interests.

FINSA is administered by the Committee on Foreign Investment in the United States (CFIUS), an inter-agency body chaired by the US Treasury Department to which the President has delegated certain authority. To reduce the possibility of a completed transaction being unwound, parties to a transaction can submit, in advance, a voluntary notice of the transaction to CFIUS. Although this clearance process is voluntary, CFIUS can initiate its own investigation of a transaction if the parties do not choose to file a voluntary notice. Without CFIUS clearance, the President retains the power to block or unwind a transaction indefinitely, such transactions are open to potential unravelling at any time. Presidential findings and actions are not subject to judicial review (*FINSA*).

There is no authoritative list of sectors in which an acquisition or merger definitely raises national security concerns. The 2007 FINSA amendments, however, place special scrutiny on industries considered to be critical infrastructure, a term that is defined very broadly. In addition, it is advisable that any transaction involving a US business that does significant business with the US government or its contractors (particularly in the defence or intelligence sectors) be formally notified to CFIUS. Transactions involving foreign parties that are partially or wholly state-owned also attract increased scrutiny. The extent to which the US business being acquired makes products subject to US export control laws is another factor to consider when deciding whether to make a CFIUS filing.

In addition, CFIUS has previously focused on acquisitions or mergers with certain types of US businesses, including those in the following sectors:

- Aerospace.
- Chemicals.
- Encryption or other information security.
- Energy infrastructure or resources.
- Fibre optics.
- Mining and minerals.
- Semiconductors.
- Telecommunications.
- Transportation infrastructure or other critical infrastructure.

Transactions submitted to CFIUS are subject to a 30-day review, and if no decision is made in the initial review, CFIUS starts a 45-day second-stage investigation. At the end of this period, CFIUS can either:

- Determine that the transaction does not pose a national security threat.
- Present a recommendation to the President to block or unwind the transaction. The President has 15 days in which to make his decision.

The law requires a 45-day investigation in cases involving critical infrastructure if the Committee determines that the transaction could impair national security and that the threat has not been mitigated, and for investments by an entity controlled by a foreign government. This 45-day investigation period can be waived by agreement of high-level CFIUS agency officials. In practice, the President has only blocked two transactions, as parties to a transaction either enter into a mitigation agreement to enable the transaction to proceed, or voluntarily withdraw their CFIUS notice.

In addition, applicable US federal laws and regulations impose limitations on the aggregate ownership of companies in certain industries that can be owned by a non-US owner. For example, limitations are placed on foreign ownership of certain companies in (among others) the television and radio broadcasting, airline, banking and shipping industries. The limit is often set at 25%, though it is higher in some industries and there are certain industry-specific exceptions.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on repatriation of profits or exchange control rules for foreign companies.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

In addition to the reporting requirements applicable to holders of more than 5% of a company's equity securities (*see Question 8*) or the acquisition of securities with a value in excess of the applicable anti-trust threshold (*see Question 25*), the following restrictions (each of which is subject to certain exceptions) apply to persons dealing in securities of the parties to the bid:

- A bidder, its dealer manager, and financial adviser (if receiving a contingency fee) cannot acquire any target shares during a tender or exchange offer, except as part of the offer (*Rule 14e-5, Exchange Act*).
- Issuers and selling shareholders (and their affiliated purchasers) cannot bid for or buy securities of the acquirer that will be issued to the target's shareholders in a stock-for-stock merger or exchange offer (*Regulation M, Exchange Act*).
- Directors, certain executive officers and greater-than-10% shareholders of a US public company (not including foreign private issuers) must report their transactions in the company's equity securities and pay the company any profit realised from any purchase and sale of any of the company's equity securities within any six-month period (known as short-swing profits) (*section 16, Exchange Act*). This right to recovery (enforced by professional claimants' lawyers) applies to securities issued or converted into other securities as the result of a takeover, subject to an exemption for dispositions that are approved by shareholders or the board pursuant to a merger.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are two recent reform proposals which could affect US takeovers.

Inversion transactions

In order to reduce their effective tax rates, several US companies have recently engaged in multi-billion dollar "inversion" transactions by which they have re-domiciled in a foreign target company's jurisdiction. Although simply re-domiciling off-shore is prohibited by the existing rules, it is possible under the existing rules to re-domicile in connection with certain M&A transactions. A typical inversion transaction generally involves the acquisition by a non-US company of stock of an existing US company in exchange for stock of the non-US company (and possibly cash) where former shareholders of the non-US target receive more than 20% of the non-US holding company's shares. A significant benefit of this transaction is that the non-US target remains outside of the US tax net and therefore will not be subject to US tax at rates of up to 35%.

While section 7874 of the Code and its regulations provide complex rules governing the US tax treatment of such inversions, the Internal Revenue Service (IRS) issued a notice in 2014 announcing that it would introduce additional regulations providing for additional rules that restrict inversion transactions. The objectives of the notice are to reduce the ability of a US company to engage in inversion transactions by tightening the rules regarding the percentage ownership that former shareholders of the non-US target must own in the non-US holding company (ownership test) and to reduce the US tax advantages of certain post-inversion restructuring transactions (for example, transactions that result in controlled foreign corporations (CFCs) of the US company no longer being treated as CFCs after the inversion).

Fee-shifting bye-laws

In response to the sharp increase in shareholder class actions in connection with takeover transactions over the past several years, some companies have introduced fee-shifting bye-laws in order to deter spurious shareholder litigation. Fee-shifting bye-laws generally require the losing party in any shareholder litigation to pay the costs of the litigation.

In May 2014 the Delaware Supreme Court issued an opinion holding that fee-shifting bye-laws were facially valid in the case of a non-stock corporation (*ATP Tour v Deutscher Tennis Bund*). However, the Delaware State Bar Association quickly proposed new legislation which would ban fee-shifting bye-laws and negate the court decision. This legislation was approved by the Delaware legislature in June 2015 and will become effective in August 2015.

THE REGULATORY AUTHORITIES

Securities and Exchange Commission (SEC)

W www.sec.gov

Main area of responsibility. The SEC is responsible for the administration and enforcement of federal securities laws and regulation of stock exchanges and brokers/dealers.

Antitrust Division, Department of Justice (DOJ)

W www.justice.gov/atr

Main area of responsibility. The Antitrust Division is responsible for the enforcement of federal anti-trust laws.

Federal Trade Commission (FTC)

W www.ftc.gov/bc/

Main area of responsibility. The FTC is responsible for the enforcement of federal anti-trust and consumer protection laws.

Practical Law Contributor profiles

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Areas of practice. Public and private cross-border mergers and acquisitions; joint ventures; strategic alliances and private equity transactions; corporate governance and takeover defence issues; fairness opinions and other financial advisory matters for investment banking and securities companies.

Recent transactions

- Represented the Mizkan Group in its US$2.15 billion acquisition of the Ragu and Bertolli pasta sauce business from Unilever.
- Represented Fujifilm Holdings in its US$995 million tender offer for SonoSite.
- Advised Shiseido in its US$1.7 billion tender offer for Bare Escentuals.
- Advised Mizuho Bank in its US$3.2 billion acquisition of a North American corporate loan portfolio from Royal Bank of Scotland, its acquisition of Banco WestLB do Brasil, its US$100 million investment in CITIC Pacific Ltd, its US$1.2 billion investment in Merrill Lynch and its investment in Evercore.

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Recent transactions

- Citigroup Inc in its acquisition and disposition of various domestic and international credit card portfolios.
- JetBlue Airways Corporation in the entry into a co-brand credit card agreement with a new issuer, the acquisition of slots from American Airlines, Inc and US Airways Group, Inc and the acquisition by Deutsche Lufthansa AG of a 19% interest in JetBlue.
- ARX Holding Corp in the US$875 million sale of a controlling interest to The Progressive Corporation.
- Rockwood Holdings, Inc in the US$1.1 billion sale of its titanium dioxide and pigments businesses to Huntsman Corporation.