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United States

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in United States.

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UNITED STATES
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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

In the U.S., both the federal government and state governments regulate matters relevant to M&A.

At the federal level, M&A activity is subject to the federal securities laws, principally the Securities Act of 1933 (the Securities Act) and the Securities Exchange Act of 1934 (the Exchange Act). The Securities and Exchange Commission (SEC) is the federal agency charged with enforcing the federal securities laws and has promulgated extensive rules and regulations under both the Securities Act and Exchange Act. The Securities Act governs the offer and sale of securities, and so potentially applies to any transaction in which securities are being purchased, sold or exchanged, including M&A transactions. The Exchange Act deals with, among other things, ongoing reporting obligations for public companies, tender offers, proxy statements and shareholder obligations to disclose ownership and transactions with respect to shares of public companies. All M&A transactions must also comply with the federal antitrust laws, which are enforced by the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC). Acquisitions by non-U.S. entities are also potentially subject to review by the Committee on Foreign Investment in the U.S. (CFIUS).

In the U.S., corporations are incorporated under the laws of a particular state (rather than federal law). As a result, state law principally addresses matters such as the formation and dissolution of corporations, duties of boards of directors, mergers and other forms of business combinations, shareholder voting requirements, shareholder meetings and amendments to organizational documents. State law relevant to corporations consists of both the state corporation statutes enacted by state governments as well as common law arising out of judicial decisions. Though state laws relevant to corporations have many common elements across states, there are significant differences among them (particularly with respect to matters such as business combinations and the obligations of directors in connection with M&A activity). Because many major U.S. corporations are incorporated in Delaware, the Delaware General Corporation Law (DGCL) and the common law embodied in decisions of the Delaware courts are generally the most important and influential state corporation law. However, on key matters relevant to M&A activity, several states have diverged from Delaware and so it is necessary to consider the law of the state of incorporation of the relevant companies in connection with a transaction.

Companies in certain industries such as banking, power and utilities, insurance, airlines, media and telecommunications may also be covered by specific state and federal regulatory regimes.

2. What is the current state of the market?

M&A activity for U.S. targets in 2022 decreased dramatically from the record highs of 2021 to $1.5 trillion in deal volume in 2022, a 38% decrease from the prior year. This drop off was part of a slowdown in M&A across all regions, with U.S. M&A maintaining approximately the same share of global deal volume as it did in 2021. The volume of cross-border inbound deals for U.S. targets dropped over 53% from the approximate $530 billion in inbound M&A volume we saw in 2021 to just over $248 billion in inbound M&A volume in 2022.

Global Private Equity was down 36% in deal value in 2022 as compared to all of 2021, with the U.S. Private Equity market declining at a slightly slower pace over that same period. Median deal size for U.S. Private Equity also declined to $50.0 million in 2022 from the anomalous $70.1 million median deal size of 2021.

2022 also saw a continued slowdown in the overall deal value involving special purpose acquisition companies (“SPACs”). During 2022, only 99 previously announced de-SPAC mergers were completed, compared to 200 in 2021, and over that same period 66 previously announced de-SPAC mergers were terminated, compared to only 18 terminations in 2021. Additionally, in Q4 2022, there were 118 SPAC liquidations, up significantly from 16 SPAC liquidations in Q3 2022, 7 SPAC liquidations in H1 2022 and zero SPAC liquidations in all of 2021.

3. Which market sectors have been particularly active recently?

In 2022, the leading sectors for U.S. M&A activity were technology, media and telecom; healthcare; energy; real estate; and consumer and retail, representing approximately 39%, 15%, 11%, 10% and 9%, respectively, of 2022 dollar volume.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

We expect M&A activity in the U.S. over the next two years to be heavily influenced by domestic economic factors, namely, the risk of recession, interest rate stabilization, cooling inflation and a reduction in volatility for commodity prices, each of which we expect to have an impact on consumer and business confidence and the price of acquisition financing. We also expect to see a continued impact from increased antitrust scrutiny and regulatory enforcement in the U.S. M&A market, creating obstacles to closing and affecting deal certainty. Finally, we expect that domestic political uncertainty and certain global geopolitical events, namely the war in Ukraine, will manifest as equity market volatility and impact economic fundamentals.

5. What are the key means of effecting the acquisition of a publicly traded company?

For public companies, there are two primary transaction structures-a single-step merger and a two-step transaction consisting of a tender offer followed by a merger.

One-step mergers are effected under state law, and the consideration in a merger can be cash, securities (including stock of the buyer) or a combination of both. Once the parties reach an agreement which is approved by the boards of directors of both companies, the target company submits the deal to its shareholders for approval. A vote of the shareholders of the acquirer may also be required in a transaction involving stock consideration depending on the amount of acquirer stock to be issued and will be required if the acquirer is itself merging (such as in a "merger of equals" transaction). In acquisitions, if shareholders approve the merger, the target company typically merges with a wholly owned subsidiary of the buyer, with the target company as the surviving corporation. The result is that the target company becomes a wholly owned subsidiary of the buyer. Merger transactions may use a similar structure or may involve each party merging with a merger subsidiary of a newly formed holding company with the shareholders of each merger party receiving shares of the holding company. Single-step mergers are most common in deals in which the consideration includes stock or there is expected to be a lengthy regulatory delay.

In a two-step transaction, the buyer makes a tender offer to acquire not less than a majority of the target company's stock directly from its shareholders followed by a "back-end" merger through which the buyer acquires any remaining outstanding shares. A shareholder vote on the back-end merger may be required (depending on applicable state law), but the buyer will be able to ensure that it passes since it will own a majority of the outstanding stock as a result of the tender offer. Two-step transactions are most common in all-cash acquisitions.

In addition, acquisitions of private companies can also be effected through stock purchases and asset purchases.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Public companies in the U.S. are generally required to file annual and quarterly reports with the SEC.

Among other things, these reports provide a description of the company's business, summaries of material events (including legal proceedings), selected financial information and financial statements (which are fully audited, in the case of annual reports) and management's discussion and analysis of the company's financial condition and results of operations. Public companies are also required to file reports on Form 8-K with the SEC to report certain events, including entry into material definitive agreements, acquisitions or dispositions of businesses or significant amounts of assets and changes of control. Public companies generally must also file proxy statements providing information regarding the shareholder meeting to which they relate, the matters to be voted on by the shareholders at such meeting and what the company's recommendation is with respect thereto, and other information relating to the company such as a description of the board of directors and its committees, executive and director compensation and ownership of the company's securities by directors, officers and large shareholders.

When seeking shareholder approval of a transaction, targets must also make additional information available to their shareholders, such as the background and reasons for the transaction and summaries of the financial analyses of its bankers. Targets typically also disclose to their shareholders projections made available to the buyer in such situations.

Beyond what companies are required to file with the SEC, a great deal of information is publicly available on company websites and from industry and trade publications and news sources. Except in very limited circumstances, filings with the SEC are publicly available through the SEC's EDGAR website.

A target company has no general obligation to disclose diligence information to a potential acquirer. However, a target company's board of directors must balance the absence of any such affirmative obligation with its fiduciary duties to its shareholders. In certain circumstances, such as where a change of control is inevitable, it is possible that refusing to provide information to potential suitors could constitute a breach of those duties. If a target company does elect to provide bidders with information, there is no specific requirement that they provide all bidders or potential bidders with the same information, although a board choosing not to do so would need to have a legitimate rationale for providing different levels of information to bidders and potential bidders.

7. To what level of detail is due diligence customarily undertaken?

Compared to other jurisdictions, buyers of public companies in the U.S. usually conduct more thorough and detailed due diligence. The scope of due diligence in private deals is typically even greater than in public deals because the amount of publicly available information concerning a target company will often be extremely limited. By contrast, the scope of due diligence in hostile public deals is usually quite restricted since potential acquirers must rely solely on information that is publicly available.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The key decision-making body of a company is its board of directors. Although the board typically delegates running the day-to-day operations to management, it is nonetheless ultimately responsible for the management of the company, and directors are expected to supervise managers and exercise oversight in order to fulfill their fiduciary duties. This authority translates to the M&A context where the board is the primary initial decision-maker of the target with respect to a potential transaction. In negotiated acquisitions, the target's board decides whether to approve a transaction in the first instance and, in the case of a public company, what recommendation to make to shareholders. In hostile transactions, although the hostile bidder typically makes an offer directly to shareholders, the target's board must still make a recommendation to its shareholders. Moreover, in practice, hostile takeover attempts generally turn into a battle over the board of the target company, either by attempting to replace the directors with a friendly slate of directors that will negotiate with the hostile bidder, or by attempting to persuade the directors to change their minds.

Shareholders of a company elect its board of directors. Shareholders are also generally entitled to vote on any extraordinary transactions, such as selling all or substantially all the assets of the company, mergers and changes to organizational documents. A buyer's shareholders generally do not have the right to vote on an acquisition unless the certificate of incorporation provides otherwise or under certain other circumstances, such as if there will be changes to the certificate of incorporation or a substantial amount of stock will be issued as consideration (typically 20% or more of the shares outstanding prior to issuance). In certain states (not including Delaware), the state corporation law does entitle a buyer's shareholders to vote on significant acquisitions.

9. What are the duties of the directors and controlling shareholders of a target company?

The fiduciary duty that directors owe shareholders has two primary elements-the duty of loyalty and the duty of care. To fulfill their duty of loyalty, directors must act in what they believe to be the best interests of the corporation, and not in their own personal interest. The duty of care requires directors to act on an informed basis after considering relevant information and with adequate deliberation. When reviewing whether directors have fulfilled their duties, courts will presume under the business judgment rule that they made their decisions on an informed basis, in good faith and with the belief that they were acting in the best interests of the company as long as a majority of the directors are independent and disinterested. This presumption may be rebutted in litigation challenging the action.

When a target company's board of directors determines to pursue a sale of control, adopts defensive measures intended to fend off a takeover attempt or intentionally interferes with the shareholders' franchise, the business judgment rule presumption generally ceases to apply in Delaware. Rather, a reviewing court will apply enhanced scrutiny to the substance of a board's actions. In this type of review, a court's inquiry goes beyond whether the board's actions were rational and examines them to determine if they met certain criteria, such as whether a defensive measure was taken in response to a threat to a legitimate corporate objective and was reasonable in relation to the threat (i.e., not preclusive or coercive). A number of states have chosen not to apply this type of enhanced scrutiny to board decisions relating to M&A activity, with the choice reflected either in a statutory provision or in case law.

In certain other circumstances, such as if a majority of a company's board is not independent or disinterested with respect to a transaction, a reviewing court will review the actions of the target company's board under the "entire fairness" standard. This is the most onerous standard of review and requires the directors to prove that they used a fair process and obtained a fair price. However, the presumption of the business judgment rule can be restored if the transaction was approved by a majority of both the disinterested directors and the disinterested shareholders.

Controlling shareholders generally owe duties to minority shareholders. While these duties do not require them to vote in a particular manner with respect to deals with third parties, they do restrict their ability to engage in self-dealing transactions with the controlled company. If a controlling shareholder engages in a self-dealing transaction with the corporation it controls, such as a merger with another company it controls or a freeze-out in which it buys out minority shareholders, courts will examine its conduct under the entire fairness standard. As with self-dealing transactions with directors, approval of a transaction with a controlling shareholder by disinterested directors and a fully informed vote of a majority of the minority shareholders can restore the presumption of the business judgment rule.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

There is no requirement that the board of a public company obtain the approval of, or otherwise consult with, employees or any other stakeholders besides shareholders. However, 30 states have adopted constituency statutes that expressly permit, but do not require, a board of directors to consider the interests of stakeholders such as employees, customers, suppliers and communities served by the corporation in determining whether or not to approve a merger.

11. To what degree is conditionality an accepted market feature on acquisitions?

There is no general prohibition on conditioning an acquisition on the occurrence or non-occurrence of certain events. Most acquisitions of public companies contain some degree of conditionality. Typical conditions include the absence of a material adverse effect prior to closing, no breach by either party of the representations, warranties or covenants contained in the merger agreement, the absence of an injunction or other legal restraint and receipt of the necessary regulatory approvals. Financing or similar conditions are permitted but rare. Where the transaction is structured to include a tender offer, the offer cannot be conditioned on events that are not objective or that are entirely within the buyer's control or else it may be deemed an "illusory" offer. In certain circumstances where closing conditions are not satisfied, such as the buyer's failure to secure the necessary regulatory approvals or obtain financing, the buyer may be required to pay a reverse termination fee to the target.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

It is unusual for the board of directors of a U.S. public company to grant a meaningful period of true exclusivity to a potential acquirer in advance of signing a definitive agreement. This is particularly the case in jurisdictions where courts apply enhanced scrutiny. Granting exclusivity to a potential acquirer precludes the consideration of alternative bids during the exclusivity period, and therefore may make it difficult for directors to fulfill their duties to shareholders to maximize value. However, where there has been an extensive effort to sell the company, whether through an auction process or otherwise, public company directors may be more willing to grant exclusivity to a buyer for a limited period of time to finalize a transaction. Public companies also sometimes grant limited exclusivity in which they agree for a period of time not to solicit other transactions, but which is subject to an exception for unsolicited acquisition proposals.

In acquisitions of private companies, particularly where the target company's shareholders are involved in the sale process, exclusivity is much more common and is often insisted upon by the buyer. In both the public and private markets, a grant of exclusivity is typically embodied in an exclusivity agreement.

Once a definitive agreement is signed, deal protection provisions (including no-shop provisions), which are discussed below, involve limited grants of exclusivity.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

In private company deals, the target company's shareholders are usually directly involved in the sale. Very strong deal protection is thus the norm as directors' concerns are lessened because shareholders typically either directly sign the acquisition agreement or consent to the transaction shortly after signing. Target companies in these types of transactions typically do not have a right to terminate the deal to enter into a competing transaction and are frequently expressly prohibited from taking actions in furtherance of a competing transaction (without any fiduciary exception).

No-shop provisions in public company deals are typically more limited and are subject to exceptions. For instance, the target company board may be permitted to discuss and negotiate unsolicited bids or, particularly in acquisitions by financial buyers, to actively solicit competing bids for a limited period of time (a so-called "go-shop"). Public company deals also generally contain a covenant requiring the target company board recommend to its shareholders that they tender or vote to approve the transaction (as applicable). However, for the same reason that no-shops are more limited in public company deals, recommendation covenants in public company deals generally contain a "fiduciary out" provision that allows the board to change its recommendation to comply with the directors' fiduciary duties (e.g., if a third party makes a superior proposal). Target boards also usually have the right to terminate an existing transaction in order to enter into a superior transaction, subject to compliance with the no-shop restrictions and typically to matching rights and the payment of a termination fee as described below.

Deal protection provisions typically include matching rights, which allow buyers to match superior proposals and keep their deal intact, and, if there are one or more large shareholders, voting agreements to vote in favor of the transaction or tender. Finally, buyers in public company deals typically negotiate for the payment of a "termination fee" by the target company if the transaction is not successful because the target accepts a competing offer. These fees are required to be reasonable and generally range from 2% – 4% of the transaction's equity value and frequently less for certain proposals received under a go-shop. In certain circumstances where closing conditions are not satisfied, such as the buyer's failure to secure the necessary regulatory approvals or obtain financing, the buyer may be required to pay a reverse termination fee to the target.

14. Which forms of consideration are most commonly used?

Federal and state laws impose essentially no limitations on what a buyer can offer as consideration. However, in private company deals the consideration is typically all cash, whereas in public deals it is generally cash, stock or a combination of both. In certain circumstances, sellers in private deals may agree to the payment of earn-outs-graduated additional payments made by the buyer to the seller based upon the target company's post-closing performance as measured by agreed-upon metrics (e.g., revenue, EBITDA, etc.). Similarly, public company deals may include contingent value rights – lump-sum payments made by the buyer to the target shareholders after closing upon the post-closing occurrence (or non-occurrence) of events largely outside the control of the buyer, seller or target company (e.g., FDA approval of a particular drug).

In determining what to offer as consideration, buyers typically consider several factors. Key among these are their financial condition and cost of capital; if securities are to be issued, what effect, if any, the issuance might have on their market price; whether target shareholders have any preferences with respect to the form of consideration; corporate and securities law considerations (e.g., the ability to comply with applicable disclosure requirements in connection with the acquisition and afterwards if securities are issued); and the tax implications of a particular form of consideration.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

A target company generally is not obliged to disclose that it is exploring a sale or engaged in negotiations with a potential buyer or buyers prior to entering into a binding agreement. Similarly, potential buyers also have no general duty to disclose a potential acquisition unless they enter into a binding agreement that is material to the acquirer or commence a tender offer. Although it is not common in the U.S. market, some acquirers obtain "toehold" positions in the securities of the target company prior to making an offer. In these circumstances, the Exchange Act requires that the buyer file a Schedule 13D within 10 days after obtaining beneficial ownership of 5% or more of the equity securities of the target. The buyer is also required to amend the Schedule 13D "promptly" upon the occurrence of any material change in facts. In 2022, the SEC proposed amendments to Schedule 13D, whereby the filing deadlines for Schedule 13D beneficial ownership reports would shorten from 10 days to five days and amendments would be required to be filed within one business day.

While neither buyers nor targets have a general obligation to publicly disclose a potential deal or negotiations relating thereto, U.S. public companies may not selectively disclose any such information to investors under Regulation FD, except to investors that agree to keep it confidential and not trade on the information. The Exchange Act also imposes a reporting obligation on public companies by requiring them to file a Form 8-K upon the occurrence of various events, as more fully described in Question 6. Finally, a company undertaking a securities offering will be obliged to disclose all material information in connection with the offering, which may include unrelated pending M&A activity.

16. At what stage of negotiation is public disclosure required or customary?

There is no general duty of disclosure for either the target or the buyer while negotiations are taking place. This duty changes, however, once a binding agreement has been entered into or a tender offer has been commenced. Upon entrance into a definitive agreement, the public buyer and target must file Form 8-Ks, as more fully described in Question 6, informing their shareholders of the entrance into a binding material agreement.

The requirements are slightly different in relation to the commencement of a tender offer. If acceptance of the offer would result in the buyer owning more than 5% of the target, then the buyer must file a Schedule TO informing the public and the shareholders about the offer.

Additionally, while there are no U.S. securities laws that require the parties to keep negotiations confidential, it is customary for the parties to enter into a confidentiality agreement at the outset of negotiations to maintain the secrecy of the transaction until a binding agreement is signed. This custom exists because a number of negative consequences can result from premature disclosure of a potential transaction such as increasing the price of the target's shares (if the market views the potential deal favorably) or prompting competing bids for the target.

17. Is there any maximum time period for negotiations or due diligence?

There are certain jurisdictions that place restrictions on the timing and depth of due diligence in mergers. No such restrictions are found in U.S. law. In the U.S., the due diligence process is driven largely by the requests of the buyer and the target's willingness to cooperate. The process can continue for as long or as short as the parties agree. Before engaging a potential target, the buyer can conduct preliminary due diligence of the target's publicly available information.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

There is no general requirement for a potential buyer to offer a minimum price for a target company's shares, even if it previously acquired shares of the target in open-market transactions. However, in some states, once a buyer acquires a certain percentage of a target's shares it may not merge with that company unless it complies with minimum or fair price requirements, or the merger is approved by the target board of directors and/or a certain percentage of disinterested shareholders. In states with these statutes, the minimum or fair price is usually determined by reference to the market price of the target's shares or the highest price the buyer paid to acquire its shares.

In the context of a tender offer, the rules promulgated under the Exchange Act require that anyone conducting a tender offer pay the same consideration to all tendering shareholders (the so-called "best price rule"). In addition, the organizational documents of some corporations and the laws of some states require buyers in two-step transactions to pay the same consideration to shareholders in both the tender offer and the back-end merger (which is the common practice in any event).

19. Is it possible for target companies to provide financial assistance?

There is no general prohibition on target companies providing financial assistance to buyers.

20. Which governing law is customarily used on acquisitions?

As discussed above, M&A activity in the U.S. falls under the purview of federal and state securities and antitrust laws, state corporation laws and laws regulating the particular industry the parties operate in (e.g., insurance, telecommunications). In addition to these laws, which provide the general framework in which deals must be accomplished, transaction agreements and other ancillary contracts almost always contain a provision stipulating which state law governs the contract as well as any disputes that may arise with respect thereto. The majority of private transactions stipulate that either New York or Delaware law will govern. In public company transactions, the law of incorporation of the target company typically governs and, if not, the law of the target company will govern the merger provisions with New York or Delaware law governing the remainder of the contract.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The type of documentation a buyer is required to produce is determined by whether the acquisition is structured as an all-cash deal or if the consideration will include stock. In an all-cash deal structured as a two-step transaction, the buyer is required to prepare an offer to purchase in connection with the tender offer. The offer to purchase contains very limited information about the target and acquirer, a summary of the negotiations leading up to the transaction, certain information about the acquirer's plans for the target company and the source and amount of the funds the acquirer is using for the transaction (including a description of any financing arrangements). The target company must prepare and file a Schedule 14D-9, in which the target board provides its recommendation to shareholders with respect to the tender offer.

In a one-step, all-cash deal, the target company must prepare a proxy statement for delivery to its shareholders. The proxy statement contains much of the same information about the buyer as an offer to purchase.

In transactions involving stock consideration, the buyer is generally required to prepare and file with the SEC a registration statement containing a prospectus that includes information about both the buyer and the target company. That prospectus will also usually function as the proxy statement for the target company in a merger structure. Among other things, the proxy statement/prospectus must contain all the information (including buyer financial statement information) that would be included in a prospectus for the buyer, including, if the acquisition is material to the buyer, proforma financial statements. In an exchange offer (which is not a common structure outside of the hostile bid context), the buyer's prospectus will also contain the information that would be contained in an offer to purchase for cash, and the target company is required to file Schedule 14D-9. For acquirers which are not already reporting companies under the Exchange Act, the disclosure requirements associated with using stock consideration can be quite substantial and can involve significant time in order to comply.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

The majority of shares in U.S. public companies are held in book-entry form by the Depository Trust Company, commonly referred to as DTC. Where this is the case, transfers are undertaken by banks, brokerages and other financial institutions and typically do not result in any change to record ownership. Where shares are held in registered form, a transfer agent typically completes transfers of shares for the issuing company. The specific requirements of each transfer agent may differ slightly, but in general shareholders must provide a stock power, provide evidence of legal capacity to sign the stock power and send any physical share certificate representing the shares to be transferred to the transfer agent. Once it receives all the necessary documentation, the transfer agent will transfer ownership on the company's share register and, if the new holder wishes to hold its share in certificated form, issue a new certificate.

The federal government does not impose transfer taxes on the transfer of shares, but the laws of some states do impose such transfer taxes.

23. Are hostile acquisitions a common feature?

Hostile acquisitions of public companies are permitted in the United States, although they constitute a minority of total transactions. Hostile takeovers remain difficult because of the uncertainty surrounding them, the increased cost of proceeding on a hostile basis, the lengthy amount of time involved with dismantling a target's defensive measures and because some buyers may not be comfortable with the more limited scope of due diligence. Moreover, in hostile acquisitions that ultimately succeed, the target company typically drops its opposition and agrees to negotiate with the hostile bidder prior to consummating the merger.

24. What protections do directors of a target company have against a hostile approach?

U.S. law does not have a general prohibition on "defensive measures" or "frustrating actions", and the board of directors of a target company has several lines of defense against an attempted hostile takeover. First, the organizational documents of the target corporation may provide various structural defenses. Most notable among these is a staggered board, in which directors are separated into multiple classes with multi-year terms (normally three classes with three-year terms). Directors on a staggered board typically can only be removed for cause, effectively precluding a hostile bidder from launching a proxy fight to replace the entire board at once, which has the effect of requiring the hostile bidder to win two proxy fights to gain a majority of the target board. Among major U.S. public companies, staggered boards have become significantly less common over time due to institutional investor pressure to eliminate them. Other structural defenses include prohibiting action by shareholders by written consent, requiring advance notice for the submission of director nominations and proposals by shareholders, limiting or preventing the ability of shareholders to call special meetings, limiting shareholders' ability to alter the size of the board, requiring that all shareholders receive the same consideration and requiring a supermajority vote of shareholders to approve changes to organizational documents or to approve a transaction.

Many states also have statutes that provide some protection against hostile bids, although corporations generally have the ability to opt out of their coverage. In states with business combination statutes, such as Delaware's DGCL § 203, a company cannot merge with a person that holds a certain percentage of its stock for a certain period of time after such shareholder crossed the threshold ownership percentage unless certain criteria, such as approval by the board and a supermajority of shareholders, are met.

Control share acquisition statutes prevent shareholders that acquire more than a certain percentage of a target company's stock from voting those shares unless the other disinterested shareholders approve.

Finally, as discussed in Question 10, several states have constituency statutes that allow directors to consider the impact of a transaction on stakeholders other than shareholders.

A target company can also adopt a shareholder rights plan, colloquially known as a "poison pill". Poison pills are options granted to target company shareholders that allow them to purchase shares of the buyer or additional shares of the target, in either case at a steep discount, upon certain triggering events such as a potential buyer acquiring a certain percentage of the target's stock (typically 10% – 20%). A shareholder rights plan generally deters potential buyers from exceeding the threshold in order to avoid the severe dilution that would result from the rights being triggered. Since the rights under a rights plan can be redeemed by the target company board, a hostile acquirer would need to either reach agreement with the target company board or obtain control of the target company board in order to redeem the rights by convincing the target shareholders to replace the incumbent directors (most commonly through a proxy fight).

In addition to the structural and statutory defenses outlined above, a target's board may also pursue alternative strategies such as mounting a public relations campaign, affirmatively trying to draw the attention of antitrust or other regulators or pursuing alternative transactions. In all cases, a board attempting to defend against a hostile bid must be mindful of its fiduciary duties, as courts in many jurisdictions subject defensive tactics to enhanced scrutiny.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Neither federal law nor Delaware law requires shareholders that have obtained significant stakes in companies to make mandatory or compulsory offers for the remaining outstanding shares. However, some states have combined aspects of control share acquisition and fair price statutes and adopted so called "control share cash-out" provisions in their corporation laws. These statutes require that, unless the organizational documents of a corporation provide otherwise, if a shareholder obtains a certain percentage of voting power, other shareholders can demand that such shareholder purchase their shares at a fair price.

26. If an acquirer does not obtain full control of a target company, what rights

do minority shareholders enjoy?

Minority shareholders continue to have full rights as shareholders in the company, including voting rights. If the company remains listed after the buyer's acquisition of a majority stake, the controlled company will be subject to ongoing reporting obligations, although it may be able to opt out of some governance requirements imposed by the stock exchanges. Moreover, as outlined in Question 9, where a company has a controlling shareholder, that controlling shareholder owes the corporation's minority shareholders a duty of loyalty.

27. Is a mechanism available to compulsorily acquire minority stakes?

Most states have short-form merger statutes that permit a majority shareholder that has obtained a certain percentage of a company's stock (typically between 80% – 90%) to "squeeze out" minority shareholders by merging it with the parent without submitting the transaction to a shareholder vote. In addition to allowing short-form mergers, Delaware permits a buyer that has purchased in a tender offer a number of outstanding shares in the target that would otherwise be required to approve a merger (generally a majority, although the target company's organizational documents may set a higher threshold) to consummate a merger with the target without submitting it to a shareholder vote, provided certain other conditions are met. Notably, this mechanism is not available in hostile takeovers, as there must be a merger agreement in place specifically contemplating the use of the specific statute that authorizes it.

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