Introduction

The Model Tender Offer Agreement is a form of agreement that provides for the acquisition of a publicly-traded company for cash consideration by means of a negotiated tender offer. The form includes explanations of various clauses, particularly those relating to the use of a tender offer structure.

1. Using the Model Tender Offer Agreement

The Model Tender Offer Agreement is intended to show some of the ways that parties might draft different parts of an agreement for the acquisition of a publicly-traded company, for cash consideration, using a tender offer structure. For purposes of illustration, the Model Tender Offer Agreement is drafted as a relatively seller-favorable form, such as a target company might use as its first draft of an agreement, with more buyer-friendly alternatives included in the Commentary.

Of course, the actual terms and text that a target company might want to use as its first draft will depend on multiple factors, including (among many others) the desired business terms, the circumstances and context of each of the target company and the acquiror, including the target company's prospects, the manner in which the target company has pursued the sale and expected negotiating leverage. Nothing in the Model Tender Offer Agreement is intended to suggest that there is any "standard" language for, or any one "right" way to draft, any particular provision or address any particular issue. Each acquisition, and each party to an acquisition, has its own context, with its own motivations, constraints and perspectives on negotiating leverage, and there are many ways to negotiate, document and effect many of the various aspects of each acquisition.

The Model Tender Offer Agreement was prepared by members of the American Bar Association Business Law Section's Mergers and Acquisitions Committee's Task Force on Two-Step Tender Offers, and completed at the end of 2018. Subsequent changes in law and practice are not reflected in the Model Tender Offer Agreement.

Use in Conjunction with the ABA Model Merger Agreement and ABA Governance Handbook

The Mergers and Acquisitions Committee also has published a Model Merger Agreement for the Acquisition of a Public Company (the "Model Merger Agreement") (released in 2011) and, with the Business Law Section's Corporate Governance Committee, a handbook, The Role of Directors in M&A Transactions: A Governance Handbook for Directors, Management and Advisors (released in 2019) (the "Governance Handbook").

The Model Merger Agreement also provides for the acquisition of a publicly-traded company, but for stock consideration, by means of a one-step merger. In contrast to the Model Tender Offer Agreement, the Model Merger Agreement is intended to be relatively buyer-favorable, such as an acquiror might provide as its first draft in a negotiation. The key differences between the Model Tender Offer Agreement and the Model Merger Agreement thus are:

ABA Public Company Acquisition
Illustrative Model Agreements

	Model Tender Offer Agreement	Model Merger Agreement
Structure	• Two-step tender offer and merger	• One-step merger
Orientation	• Seller-friendly	• Buyer-friendly
Form of Consideration	• Cash	• Stock

The differences between the Model Tender Offer Agreement and Model Merger Agreement are not intended to suggest that sellers tend to favor tender offers and acquirors tend to favor mergers, or that sellers tend to prefer cash consideration and acquirors tend to prefer stock consideration; rather, they are merely a means of illustrating issues relating to the two acquisition structures and types of consideration. Some of the reasons for choosing between a tender offer structure and a one-step merger are discussed below in this Introduction and in the Commentary to the Model Tender Offer Agreement.

The Model Merger Agreement also provides examples of several ancillary agreements that may be needed in connection with the acquisition of a publicly-traded company, regardless of structure used, including:

- a nondisclosure agreement,
- an exclusivity agreement, and
- a stockholder support agreement.

The Governance Handbook provides a more detailed review of various corporate governance issues implicated in acquisition transactions, including fiduciary duty issues.

Commentary

We have included commentary on many provisions in the Model Tender Offer Agreement to explain the purpose of the provision and to note some alternatives that a target company might consider or that an acquiror might propose. The commentary generally focuses on (but is not limited to) provisions that are unique to a tender offer structure, or where there may be additional considerations in connection with a tender offer structure, rather than on provisions common to both a tender offer structure and a merger structure. For a fuller discussion of provisions in public company acquisition agreements, particularly those common to both merger structures and tender offer structures, as well as the use of stock in such acquisitions, reference should also be made to the Model Merger Agreement.

Assumptions in the Model Tender Offer Agreement

An acquisition agreement must reflect the context of the transaction. The Model Tender Offer Agreement accordingly reflects a number of assumptions about the target company, the acquiror and the circumstances of the transaction. We tried to make those assumptions as broadly relevant as possible. Key assumptions include:

- the target company is a Delaware corporation,[1]
- the shares of the target company are publicly traded on Nasdaq;
- the target company has only one class of stock outstanding;
- the target company does not have a controlling stockholder;
- the target company is seeking opportunities but is not under any particular compulsion to sell;
- the acquiror is a creditworthy company with a business of its own;
- the acquiror has in hand all funds needed for the transaction, and does not require additional debt or other financing;
- the stockholders of the acquiror do not need to approve the transaction;
- the transaction does not involve regulatory risk that is likely to delay or prevent closing; and
- the transaction is at arm's length.

1. Many U.S. public companies are incorporated in Delaware, including more than 66% of the Fortune 500. *See* State of Delaware, Department of State, Division of Corporations, About the Division of Corporations, https://corp.delaware.gov/aboutagency, accessed October 24, 2018. A target company may be incorporated under the law of a jurisdiction other than Delaware, which even if generally similar can require different procedures and considerations. For a discussion of certain such differences, see Governance Handbook, Chapter 15, *Governance Issues in Non-Delaware Jurisdictions*.

Variations from these assumptions, along with other aspects of the context of the deal, likely would require changes to the provisions included in the Model Tender Offer Agreement.[2]

2. Basic Structures for Acquiring a Public Company

Structures for acquisitions of U.S. publicly-traded companies in negotiated transactions generally fall into one of two basic categories:

- A "one-step" merger; or
- A "two-step" tender offer followed by a merger.

Each of these structures is effected pursuant to an agreement approved by the board of directors of each of the acquiror and the target company (almost always referred to as a "merger agreement" regardless of which structure is used) and then presented to target company stockholders for their action. The structures are alike in many ways, including with respect to the need to address:

- principal terms of the transaction, including the price, the representations and warranties of the parties to each other, covenants, and closing conditions;
- target company board fiduciary duties;
- required target company stockholder action (whether tendering or voting);
- disclosures to the target company stockholders in connection with such action and related SEC review;
- regulatory requirements (such as antitrust); and
- actions of the parties during the period between the signing of the acquisition agreement and the closing of the acquisition.

The structures differ, though, in some respects, principally relating to required stockholder action, as discussed below. Given their differences, in some circumstances, and from some perspectives, one structure may work better than the other, and in some circumstances the acquiror and the target company may differ over the preferred structure.

2. Although tender offers are sometimes associated with "hostile" approaches by a would-be acquiror directly to the stockholders of a target company, without a merger agreement with the target company and without approval of the target company's board of directors, the Model Tender Offer Agreement contemplates a negotiated, "friendly" acquisition. We also are not addressing transactions intended to result in or that allow for the acquisition of less than all of the shares of the target company.

Stockholder Approval

Mergers

Negotiated acquisitions of U.S. publicly-traded companies generally are premised on majority rule – by following appropriate procedures (including approval by the target company's board of directors), an acquiror can acquire all the shares of a company if the holders of a majority of the target company's shares approve (and other conditions are met or waived).[3] In a one-step merger structure, that approval is obtained by stockholder vote; the target company's directors approve a merger agreement and then submit that agreement to the stockholders for their approval at a meeting called for that purpose.[4] For Delaware corporations, the holders of a majority of the outstanding voting power of the shares of the target company generally must vote to adopt the merger agreement.[5] Approval thresholds and other requirements for mergers may vary from state to state, depending on applicable statutes, and also may differ for an individual company, depending upon a target company's governing documents.

Once the requisite approval is obtained (and other conditions are met or waived), the merger can be closed, resulting in the acquisition by the acquiror of all of the target company's stock. All of the target company's pre-merger outstanding shares (other than shares, such as treasury shares, that the parties agree will remain outstanding or be cancelled for no consideration) are converted as a result of the merger into the right to receive the merger consideration, including those held by stockholders who did not vote to adopt the merger agreement (subject potentially to statutory remedies such as appraisal).

Tender Offers

In a tender offer structure, target company stockholders initially do not vote on adoption of a merger agreement as a corporate action, but rather decide individually whether or not to tender their shares into the offer. If holders tender enough shares to meet the condition agreed by the parties (and other conditions are met or waived), the tender offer can be consummated and the acquiror takes ownership of the tendered shares.

3. In some cases a supermajority or other specified majority approval may be required, either by statute or by the target company's governing documents. The parties also might agree to a higher approval threshold with respect to their specific transaction than is otherwise required, such as in certain interested stockholder situations where the parties might seek a "majority of the minority" or other additional stockholder approval.

4. As discussed more fully below, some corporations allow stockholders to act by written consent in lieu of voting at a meeting. *See, e.g.,* Delaware General Corporation Law ("DGCL") § 228.

5. DGCL § 251(c). A company also can opt in its certificate of incorporation for a higher required vote DGCL § 102(b)(4). In some circumstances, discussed more fully below, an acquiror that owns a supermajority of the target company's outstanding shares may be able to effect a merger of the target company without any action by the target company's board or other stockholders.

Shares not tendered are not affected directly by the closing of the tender offer. The target company and the acquiror thus at the outset enter into a merger agreement that provides for both (1) the tender offer by the acquiror and (2) if the tender offer is consummated, a merger in which the target company's other shares are converted into the same agreed transaction consideration. The merger following the tender offer sometimes is referred to as a "back-end" or "second step" merger, as opposed to the "front-end" or "first step" tender offer.

In their merger agreement, the parties typically require, as a condition to purchasing shares in the tender offer, a minimum level of tenders (referred to as a "minimum tender condition") such that the acquiror will be able to control any target company stockholder vote needed to approve the back-end merger. Accordingly, if, following the tender offer, the target company stockholders must vote to adopt the merger agreement, approval is assured, since the acquiror will vote the target company shares it owns in favor of the merger.

Delaware courts have recognized that voting in favor of the adoption of a merger agreement and tendering in a tender offer are similar for purposes of expressing approval of a proposed transaction, at least in the context of a negotiated transaction where, following closing, shares not voted in favor of the transaction (whether voted against the transaction or not voted at all) and shares not tendered in the transaction will promptly be treated the same as shares voted in favor of the transaction or tendered – *i.e.*, all stockholders get the same merger consideration.[6]

<u>Stockholder Approval of a Second-Step Merger After a Tender Offer</u>

Target company stockholder approval of a second-step merger after completion of a first-step tender offer is addressed in state corporate statutes in one of three ways, depending on the portion of shares actually owned or otherwise held by the acquiror at the time of the merger and other considerations:

6. *See In re Volcano Corp. S'holder Litig.*, 2016 WL 3626521, at *15 (Del. Ch. June 30, 2016) (finding that stockholder coercion concerns in a tender offer relative to a merger are "alleviate[d]" in a tender offer and merger under DGCL Section 251(h) (discussed below) "because (1) the first-step tender offer must be for all of the target company's outstanding stock, (2) the second-step merger must 'be effected as soon as practicable following the consummation of the' first-step tender offer, (3) the consideration paid in the second-step merger must be of 'the same amount and kind' as that paid in the first-step tender offer, and (4) appraisal rights are available in all Section 251(h) mergers, subject to the conditions and requirements of Section 262 of the DGCL") (internal footnotes omitted). Since *Volcano* was issued, appraisal rights were eliminated for transactions effected under DGCL Section 251(h) in which the merger consideration is public company stock, such that the fourth factor cited by the Court as "alleviat[ing] the coercion that stockholders might otherwise be subject to in a tender offer" would not be applicable in such mergers.

(i) the "traditional" majority stockholder vote method, requiring the target company to hold a stockholder meeting (or in some cases solicit stockholder consents), with attendant proxy solicitation and other procedures – sometimes referred to as a "long-form" merger;

(ii) eliminating the stockholder vote, and allowing the merger to be effected by unilateral action by the acquiror, if the acquiror holds a specified supermajority of the target company's outstanding shares – sometimes referred to as a "short-form" merger; and

(iii) in a relatively new mechanism, available in Delaware and a few other states, eliminating the stockholder vote if, following consummation of the offer, the acquiror owns or otherwise holds a majority of the target company's outstanding shares (or such higher portion of the company's shares as may be needed to control a stockholder vote in any stockholder meeting that otherwise would have been required) – sometimes referred to as a "medium-form" merger. Although the newest of the three methods, this mechanism has quickly become the standard for closing the second step merger, except where it is not available.

The requirements of the various voting standards are discussed more fully below, focusing on Delaware law requirements.

(i) Stockholder Meeting and the "Long-Form" Merger Process

The target company stockholder approval required for the back-end merger can be obtained through a stockholder approval process. Generally, this requires that the target company hold a stockholder meeting and go through procedures applicable to a one-step merger structure, even without a tender offer, which include:

- Federal securities rules procedures, which require, among other things, submission of a proxy statement to the Securities and Exchange Commission ("SEC") for potential comment and then distribution to stockholders at least 20 business days in advance of the meeting.[7]

- State law procedures, such as under Section 251(c) of the DGCL, which requires that, if the vote of the target company stockholders on the merger agreement is to

7. *See* Rule 14a-6(a) (requiring filing of a preliminary proxy statement with the SEC at least 10 calendar days prior to the date the definitive proxy statement is sent to stockholders) and Schedule 14A, Note D.6 (requiring a proxy statement be sent to stockholders at least 20 business days prior to the date of the stockholder vote, if any document other than an annual report required by Rule 14a-3(b) is incorporated by reference in the proxy statement) and related discussion below. References herein to "Rules," unless otherwise specified, are to rules promulgated by the SEC under the Securities and Exchange Act of 1934, as amended.

be obtained at a meeting, the notice of the meeting be sent to each stockholder at least 20 days prior to the date of the meeting.[8]

This results in delay between the close of the front-end tender offer and the close of the back-end merger, as the parties must prepare a proxy statement and other proxy solicitation materials, file and clear them with the SEC, and go through the proxy solicitation process.

In some cases, the acquiror, as the holder after the closing of the tender offer of a majority of the target company's outstanding shares, can deliver a written consent of stockholders, rather than the target company holding a meeting. However, many public companies prohibit their stockholders from acting by written consent.[9] In any event, an action approved by written consent in lieu of a stockholder vote cannot be consummated until an information statement has been prepared by the company and submitted to the SEC, subject to similar potential comment and distribution requirements as a proxy statement for a stockholder meeting and vote.[10]

(ii) *"Short-Form" Merger Implementation by Buyer*

Many states allow a stockholder, including an acquiror in a tender offer,[11] to effect a merger of a target company without a stockholder vote if the stockholder holds more than a specified portion of the target company's outstanding shares. Traditionally, state corporate laws require an acquiror to own a supermajority (in Delaware, 90%)[12] of each class of a target company's voting stock before it may do so. Such mergers typically are referred to as "short-form mergers."

"Getting to 90." While it may be difficult to obtain tenders from 90% or more of the outstanding shares, parties have several mechanisms that may help to get the acquiror to this threshold, each as discussed more fully in Appendix II to the Model Tender Offer Agreement:

- Subsequent Offering Period

The SEC allows an acquiror to continue its offer even after the initial closing in what is known as a "subsequent offering period."[13] This can facilitate tenders by stockholders who for some reason were not able to tender during the initial tender period, and also

8. DGCL § 251(c).
9. *See* Takeover Defense Profile with Analytics, SharkRepellent.net, accessed on Jan. 5, 2018.
10. *See* Rule 14c-2(b).
11. We are assuming a negotiated acquisition and so are not addressing the potential impact of state antitakeover rules, such as those discussed in the Comment to Section 3.18 of the Model Tender Offer Agreement.
12. *See* DGCL §§ 253, 267.
13. *See* Rule 14d-11.

allows stockholders who intentionally did not tender their shares initially to tender their shares once it becomes clear that the merger will occur.

- Top-Up Option

A top-up option is an option granted to the acquiror by the target company to purchase shares from the target company, after the consummation of a tender offer, in an amount sufficient, with the shares obtained by the acquiror in the tender offer, to reach the ownership level required for the acquiror to consummate a short-form merger. The size of the tender shortfall that can be addressed by a top-up option, however, depends upon the number of authorized but unissued or treasury shares the target company has available for such purpose. As a rule of thumb, for every 1% that an acquiror's ownership falls short of the 90% short-form threshold, a number of target shares equal to 10% of the target's outstanding stock prior to the offer must be issued to the acquiror under the top-up option.

Delaware courts generally have approved of the granting by a target company board of a top-up option, noting that the acquiror in a negotiated two-step tender offer would be able to vote target company shares acquired in the tender offer to approve the merger pursuant to a long-form process, so that the top-up option serves to make the transaction more efficient.[14]

(iii) *"Medium-Form" Merger*

Some states, starting with Delaware in 2013, have eliminated, under certain conditions, the requirement of stockholder approval of a back-end merger that follows a tender offer, if, following consummation of the offer, the acquiror owns or holds enough of the target company's shares to approve such a merger if a vote were held.[15] For Delaware corporations, this kind of merger is usually referred to as a "Section 251(h) merger," after the statute enabling it, and more generally such mergers are sometimes referred to as "medium-form" mergers.

14. *See Olson v. EV3, Inc.*, 2011 WL 704409, at *2 (Del. Ch. Feb. 21, 2011). ("In a third-party arm's-length transaction, the top-up option offers the constituent corporations what appears to be a win-win. The second step closes sooner, minimizing transaction risk for both sides. Target stockholders get the consideration faster, avoiding lost time value of money. The whole process costs less.").

15. Several other states have adopted a similar provision, including Maryland (*see* Sec. 3-106.1 of the Maryland General Corporation Law), Texas (*see* Sec. 21.459(c) of the Texas Corporation Law), Virginia (*see* Sec. 13.1-718.G of the Virginia Stock Corporation Act), Oklahoma (*see* Sec. 1081H of the Oklahoma General Corporation Act) and Kansas (*see* Sec. 6701(h) of the Kansas Corporations Statute). In addition, the Model Business Corporation Act has been revised to include, at Sec. 11.04(j), provisions similar to Section 251(h).

Delaware's medium-form merger statute provides that no vote of stockholders of a target company is necessary to authorize a second-step merger following a first-step tender offer if the target company is a publicly-traded corporation[16] and:

(i) the merger agreement expressly (x) permits or requires the merger to be effected under Section 251(h) and (y) provides that the merger shall be effected as soon as practicable following consummation of the first-step tender offer if the merger is being completed under Section 251(h);

(ii) the acquiror consummates an offer for all of the outstanding stock of the target corporation that, absent Section 251(h), would be entitled to vote on the adoption of the merger;

(iii) following the consummation of the tender offer, the total of (x) the stock irrevocably accepted for purchase pursuant to the tender offer and received by the depository prior to expiration of such offer, plus (y) the stock otherwise owned by the acquiror and its affiliates,[17] plus (z) any "rollover stock" (as described in the Comment to Section 2.04 of the Model Tender Offer Agreement) equals at least the percentage of the target company's stock, and of each class and series thereof, required by the DGCL or any higher threshold required by the target company's certificate of incorporation to adopt the merger agreement;

(iv) the entity consummating the tender offer merges with or into the target company pursuant to the merger agreement; and

(v) the same amount and kind of consideration is paid to the target company stockholders in the back-end merger as the consideration offered in the first-step tender offer.[18]

The requirements of Section 251(h) are described in more detail in the Comments to the Model Tender Offer Agreement.

16. For purposes of Section 251(h), the target company is publicly traded if at least one class or series of the target company's shares is traded on a national securities exchange immediately prior to execution of the merger agreement. Section 251(h) also applies to target companies held of record by more than 2,000 holders at such time. DGCL § 251(h) preamble.

17. For these purposes, "affiliate" is based on 100% ownership, per DGCL Sec. 251(h)(6)a, which defines affiliate in respect of the corporation making the offer as "any person that (i) owns, directly or indirectly, all of the outstanding stock of such corporation or (ii) is a direct or indirect wholly-owned subsidiary of such corporation or of any person referred to in clause (i) of this definition."

18. DGCL § 251(h).

Section 251(h) requires that the merger subsidiary with which the target company is merged be a corporation.[19] If, for tax or other reasons, the parties desire the merger subsidiary to be an alternative entity, the parties must effect the second-step merger as either a long-form merger under DGCL Section 263 (long-form merger of corporations and partnerships) or 264 (long-form merger of corporations and limited liability companies) or a short-form merger under DGCL Section 267 (short-form merger of corporations and alternative entities).

Section 251(h) allows companies to opt out of Section 251(h) by so providing in the company's certificate of incorporation.[20]

<u>*Timing of Target Stockholder Approval and Closing*</u>

Assuming no regulatory delays, a tender offer typically can be closed more quickly than a merger, principally because of differences in the timing of SEC review. This can lead to faster closing of an acquisition, assuming that the back-end merger can be closed without a separate stockholder vote. Even if a separate stockholder vote is required for the second-step merger (*i.e.*, because Section 251(h) is not available and the acquiror does not hold enough shares to consummate a short-form merger), a tender offer can result in an acquiror obtaining control more quickly, at the closing of the tender offer, to be followed by completion of the acquisition when the merger can be consummated.

The general timing requirements for mergers and tender offers under SEC rules is as follows:

Merger. In a one-step merger, following execution of the merger agreement:

- The target company prepares a proxy statement (on the SEC's Schedule 14A), responding to SEC and state law requirements, for distribution to its stockholders. The proxy statement usually takes take 2–4 weeks to prepare.
- The target company files a preliminary draft of the proxy statement with the SEC, and must resolve any SEC comments *before* the target can distribute the proxy statement to its stockholders. The SEC usually provides its comments about 30 days after the initial filing, and overall the review can take 8–10 weeks or more from the initial filing, depending on the SEC's comments and the target company's responses. The SEC also can decline to provide comments, in which case the target company can distribute its proxy statement, but the target

19. DGCL § 251(h)(2), (4).
20. DGCL § 251(h) preamble.

company may not know that the SEC will decline to provide comments until 10 days after the initial submission.[21]

- The stockholder meeting typically is then held about 30 days after the target company distributes the proxy statement to its stockholders (federal securities law requires 20 business days for distribution, unless no materials other than an annual report required by Rule 14a-3(b) are incorporated by reference into the proxy statement, and state law also may require some minimum, such as the minimum 20 days required for Delaware corporations).[22]

Together with the time for distributing the proxy to stockholders, the total minimum time following signing of the merger agreement to the stockholder vote thus may be approximately 12–16 weeks (additional time may be needed for regulatory or other approvals). Assuming no other conditions delay closing (such as in order to obtain required regulatory consents), the merger can be closed promptly after the target company stockholder approval is received.

Tender Offer. In a tender offer, following execution of the merger agreement:

- The acquiror prepares a solicitation statement (responding to the SEC's Schedule TO) and the target company prepares a recommendation statement (on the SEC's Schedule 14D-9), again providing information required by federal rules and state law, for distribution to target company stockholders. Collectively these are generally similar in content to the proxy statement in a one-step merger context (though with some differences), but typically can be done a little quicker, usually in 1 to 3 weeks.

- The acquiror and the target company files their respective documents with the SEC. Like a merger proxy statement, the SEC can review and comment on these documents. However, unlike a merger proxy statement, the parties can distribute the documents to the target company's stockholders as soon as the documents are filed with the SEC, without waiting for the SEC's review period to expire or for the SEC to complete its review. The acquiror cannot *close* the offer until any SEC review comments have been resolved and any necessary dissemination period has lapsed.

- Pursuant to SEC rules, the documents must be distributed at least 20 business days (which is generally similar to the 30 calendar days for distribution of a

21. *See* Rule 14a-6(a) (requiring that a target company seeking to solicit proxies from its stockholders in connection with a stockholder vote on a merger or other matter (subject to specified exceptions not applicable to an acquisition of the target company) file preliminary copies of the proxy statement and form of proxy with the SEC at least 10 calendar days prior sending such materials to the target company's stockholders).

22. *See* Schedule 14A Note D.4 and DGCL § 251(c).

proxy statement in a merger context) prior to the expiration of the tender offer. During this time the parties often resolve any SEC comments and disseminate any required additional information (though more significant comments may take more than the 20 business day period to resolve and if resolved too late in such period additional time may be required for appropriate disclosure).

- To complete the acquisition the acquiror must effect a merger of the target company. As discussed above, in appropriate circumstances, this can be done by short-form or medium-form merger quickly after the tender offer closes.

Assuming no other conditions delay closing (such as in order to obtain required regulatory consents), an acquiror thus may be able to consummate a tender offer within 6–8 weeks after signing an acquisition agreement.

Prior Impediments to Tender Offers

In 2016, tender offers were used in roughly half of the acquisitions for cash of U.S. publicly-traded companies by strategic buyers where no debt financing was contemplated.[23] Until about 2006, however, tender offers were not very popular. Among other things, buyers were concerned with the potentially broad effect of Rule 14d-10, as then in effect, known as the "best price rule." Buyers and sellers also were concerned about the overall time that might be required to complete an acquisition if the acquiror was not able to obtain in the tender offer ownership that allowed a second-step merger without going through the procedures required for a stockholder vote. Changes since then have addressed these concerns and made tender offers a much more popular choice.

Best Price Rule

The best price rule is intended to require that acquirors pay in tender offers the same price for all shares acquired in the tender offer. Target stockholders may be able to seek damages from the acquiror if they can show that in a tender offer some stockholders were paid more for their shares than others in violation of the rule.

Before 2006, the scope of the best price rule was not clear. For example, based on the then-existing language of the rule, some courts found, in connection with tender offers, that some payments to management stockholders, such as bonuses or noncompetition payments, might have been paid as additional consideration for the management stockholder's shares and so in violation of the best price rule.[24] The damages to the acquiror could be quite large, since the acquiror could be required to pay

23. American Bar Association, Mergers and Acquisitions Committee, Strategic Buyer/Public Target M&A Deal Points Study (2017) (for transactions announced in 2016), p. 121 (reflecting acquisitions of U.S. publicly-traded target corporations with a transaction value over $200 million). ("ABA 2017 Strategic Buyer/Public Target M&A Deal Points Study") The actual percentage is 46%.

24. *See, e.g.*, *Katt v. Titan Acquisitions*, 133 F. Supp. 2d 632 (M.D. Tenn. 2000).

to all target stockholders the same extra amounts determined on a per share basis, even if the management stockholders held only a small number of shares. As a result, many acquirors steered away from tender offers unless the circumstances made application of the best price rule very unlikely.

At the end of 2006, the SEC amended the best price rule to make it more clear that management compensation arrangements were not intended to be covered by the rule.[25] The SEC also established a safe harbor, allowing the target company's compensation committee (or other specified committees of the target company or the acquiror) to determine that payments to management stockholders were in fact for compensatory purposes and not additional consideration for shares.[26]

Expediting the Second-Step Merger Approval Process

The use of tender offers also was discouraged by the potential need to go through a target company stockholder vote process to approve the second-step merger even after conducting a tender offer; such delays raised issues with respect to acquiror control and minority rights during the period after the tender offer was consummated but before consummation of the merger, as well as with respect to the appraisal valuation of the target company. Parties that were not confident in reaching the ownership level required to utilize a short-form merger thus preferred going straight to a stockholder vote in a merger structure without first attempting to obtain the requisite shares in a tender offer. However, parties developed a variety of mechanisms, including the top-up option and use of a subsequent offering period, as discussed above, to facilitate reaching a short-form merger ownership threshold. The use of tender offers was further facilitated beginning in 2013, with the adoption of Section 251(h).

3. Choosing Between a Tender Offer and a Merger Structure

The differences between merger structures and tender offer structures have been the subject of much discussion.[27] Some of the key differences and considerations are discussed below.

The target company board, in choosing between a tender offer structure and a merger structure, as with respect to all decisions, must be mindful of its fiduciary duties. A

25. *See* Amendments to the Tender Offer Best-Price Rules, Exchange Act Release No. 34-54684, 2006 SEC LEXIS 2536, 1 (2006).

26. *Id.* The best price rule and the requirements for the safe harbor are discussed in the Comment to Section 6.07 of the Model Tender Offer Agreement.

27. For an early discussion of some of the factors in choosing between tender offer structures and merger structures, and accounting for the rise in popularity of tender offers after 2006, see Transcript, *Negotiating Acquisitions of Public Companies in Transactions Structured as Friendly Tender Offers*, 116 PENN ST. L. REV. 615 (2011).

full discussion of the target company board's fiduciary duties in connection with a sale transaction is beyond the scope of this work, but a limited discussion is included in the commentary to Section 5.02 of the Model Tender Offer Agreement and a more general discussion is included in the Introduction to the Model Merger Agreement and in the Governance Handbook.

Of course, the acquiror in the transaction may have its own preferences and requirements, and the structure of the acquisition may become a matter of negotiation along with the other terms and conditions of the transaction.

Speed to Closing

One of the most significant differences between a tender offer structure and a merger structure is the potentially quicker time to closing under a tender offer structure; as noted above, in the absence of regulatory or other delays, a tender offer generally can be closed faster than a merger by at least 10 days, assuming the SEC elects not to review the merger proxy statement, or by 6 weeks or more, if the SEC reviews the merger proxy statement. Moreover, in the case of a merger, the target company board generally has some ability under the merger agreement to delay its stockholder meeting.

An accelerated timing can provide benefits for the target company and its stockholders, such as by reducing the time during which a material adverse effect could arise or the target company otherwise could go out of compliance with its representations or covenants in the merger agreement, which could give the acquiror a right not to close. The quicker time to closing also generally means that stockholders will receive their payments sooner.

Potential Impact of Timing on Competing Bids

The accelerated timing may also be a disadvantage to the target company. A target company board, in deciding whether to agree to sell the target company, generally will want to (and, in accordance with the directors' fiduciary obligations, generally must) consider the possibility that other bidders may want to acquire the target company for greater consideration. A target company board often will consider such possibilities before agreeing to be acquired, and, even after signing an acquisition agreement, usually has the right, in specified circumstances and pursuant to specified procedures, to engage with other bidders that arise after announcement of an acquisition agreement, and even to terminate the acquisition agreement in order to accept a superior offer from such a bidder.[28]

28. *See* Sec. 5.02 of the Model Tender Offer Agreement and related Comment.

The target company board accordingly may want to consider the likelihood that there may be competing bidders, and whether the generally quicker timeline of a tender offer structure is likely to make it unreasonably difficult for such bidders to make bids.[29]

In some situations, a target company board that otherwise prefers to use a tender offer structure may want to consider whether it can increase the time that may be available for a post-signing market check, such as by delaying the commencement of the offer (and accordingly the earliest potential termination of the minimum tender period) or extending, or giving the target company board the option to extend, the time from signing or commencement to closing. *See* Comment to Section 1.01(d) of the Model Tender Offer Agreement. The contours of a post-signing market check must be evaluated in the context of the facts and circumstances of the particular transaction.

Use of a Tender Offer when Closing May Be Delayed; Impact of Merger Stockholder Vote on Board's Fiduciary Duties

The potential for a faster target company stockholder approval process, whether in a one-step merger or in a two-step tender offer, does not always result in increased speed to closing. For example, delays in obtaining requisite regulatory approvals may delay a closing, regardless of the form of the transaction.[30]

In such cases, the choice between a merger structure and a tender offer structure can affect the target company board's fiduciary obligations. In particular, the target company board generally is required to make a recommendation to its stockholders and has a duty

29. Courts have noted the potentially abbreviated period between signing and closing in a tender offer structure, and the potential impact on competing bidders, though courts in many circumstances also have accepted the decision to utilize a tender offer structure as a reasonable exercise of business judgment in a sale process. *See, e.g., Forgo v. Health Grades*, C.A. No. 5716-VCS, tr. at 76 (Del. Ch. Sept. 3, 2010) (observing "that the shortening of the process" by proceeding along "the tender offer route . . . made it more difficult for an interloper"); s*ee also Blueblade Capital Opportunities LLC v. Norcraft Cos, Inc.* (Del. Ch. July 27, 2018) (noting, in the context of an appraisal proceeding, the difficulty in relying on a post-signing go-shop to support the reliability of a deal process where, among other things, the transaction was structured as a tender offer and holders of a majority of the target company's shares had agreed to tender and not withdraw their shares, even though the acquiror had not started the tender offer until 15 days after the signing of the merger agreement); *In re PLX Tech. Inc. S'holder Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018) (finding that a tender offer structure that effectively allowed competing bidders 49 calendar days to express interest provided sufficient opportunity for competing bidders).

30. If the acquiror's stockholders need to vote in connection with the deal, the acquiror will have to go through its own proxy statement process before the deal can close. This is more likely to arise where the acquiror is offering stock, rather than cash, as consideration. *See e.g.*, NYSE Rule 3.12.03(c) (requiring the vote of buyer stockholders for buyers listed on the NYSE where the acquiror is issuing more than a specified amount of stock). If the acquiror is issuing stock consideration, the acquiror also is likely to need to prepare a registration statement and get the SEC to declare the registration statement effective.

to disclose to its stockholders all material information within its control related to the requested action, whether it be to vote to adopt a merger agreement or to tender shares into an offer. The duty continues through the time of the requested stockholder action.

- In a merger transaction, a target company stockholder vote may take place a significant period prior to closing. For example, the company may be able to complete the SEC review processes and hold its stockholder meeting 3 months after signing, even though it takes longer (sometimes much longer) to obtain required regulatory approvals and so the closing does not occur for some time after the stockholder approval. At the time of the stockholder approval, though, the target company board's duty to make its recommendation generally is completed, and merger agreements generally do not provide further rights for boards or stockholders to consider or pursue potential competing deals.
- In a tender offer, however, closing of the transaction and obtaining effective stockholder approval are one and the same – each takes place when the tender offer closes. The duty of the board to make a recommendation thus remains active until the tender offer closes.

Thus, in a transaction where a deal would not otherwise be expected to close before the time a stockholder vote may take place, the parties (particularly the acquiror) may prefer to structure the acquisition from the outset as a merger and hold the stockholder vote as soon as possible after complying with SEC solicitation procedures (as discussed above), rather than continually extending the tender offer. The result, though, is that the stockholder decision with respect to the transaction will be completed and, in most cases, the right of the target board to exercise a "fiduciary out" will be cut off, at the time of stockholder approval.

"Empty Voting" Shares

In a merger transaction, the target company must set a record date to determine stockholders entitled to notice of, and to vote at, the stockholder meeting.[31] If stock trades hands after this record date, there will be (absent the acquiror obtaining a proxy to vote the stock) a split between the holder of voting rights and the holder of economic rights in the stock, at least for purposes of the stockholder meeting. This can lead to "empty voting" shares, since the holder of the voting rights no longer has any interest in the shares and thus is unlikely to vote, making it more difficult to obtain the requisite stockholder vote, which is typically based upon the number of *outstanding* shares (and not just the number of shares actually voting).

31. *See, e.g.,* DGCL § 213. The DGCL allows a corporation to set different record dates for determining stockholders entitled to notice of a meeting and stockholders entitled to vote at a meeting. DGCL § 213. Due to complexities arising under federal securities laws for split record dates, this mechanic rarely is used.

To the contrary, in a tender offer, where the tender is akin to the vote, empty voting shares typically are not an issue. In a tender offer, though, certain index funds in the past have refrained from tendering, since their goal is to stay in stocks within a certain category for so long those stocks are publicly traded, though the practice of index funds in that regard has been evolving as the use of Section 251(h) and other devices has made the closing of the second step merger (and related delisting of the stock) more likely to occur quickly after consummation of the tender offer.

Borrowing Funds for a Two-Step Transaction

Tender offer structures may make more complicated the borrowing by the acquiror of funds to pay for the acquisition, particularly if there may be a time gap between the closing of the tender offer and the closing of the merger. Although not problematic where the acquiror has sufficient funds to pay for the acquisition (as is assumed for purposes of the Model Tender Offer Agreement), this may be problematic where the acquiror is a special purpose vehicle formed by a private equity company, with no funds or other assets of its own, or a strategic company that does not have sufficient funds. As a result of these complications, the portion of acquisition transactions effected through tender offer structures is much higher for buyers that have their own funding than for buyers needing financing.[32]

Credit Limits and Margin Rules. After the closing of the tender offer, the acquiror will own a majority of the shares of the target company, but because it does not have full ownership it will have to keep the companies separate and will not have direct access to the assets of the target company. The acquiror thus cannot use the assets of the target company as security for its financing. The acquiror can use as security the target company shares that it acquired in the tender offer or otherwise holds, but federal margin rules generally prohibit an acquiror from borrowing money to buy publicly traded shares against more than half the value of those shares.[33] In a merger, on the other hand, upon closing, the acquiror immediately acquires 100% ownership of the target, and the target company securities are delisted, and the acquiror can use the target company and the target company's assets to secure any debt and will no longer be limited with respect to the target company's securities by the margin rules.

The acquiror and the lenders may be willing to rely on the prompt occurrence of the merger in a tender offer structure under Section 251(h), where the merger is expected to close on the same day as the closing of the tender offer, or if the parties are confident that

32. For acquisitions announced in 2016 by strategic buyers, where debt financing was contemplated, 18% were structured as tender offers, compared to 46% where no debt financing was contemplated (though other factors also may have influenced the choices of structures). ABA (2017) Strategic Buyer/Public Target M&A Deal Points Study (for transactions announced in 2016), p. 121.

33. Regulation U, 12 C.F.R. §§ 221.3(a)(1), 221.7.

the acquiror will receive tenders of, or otherwise be able to obtain, sufficient ownership to allow it to effect a short-form merger. Otherwise, where Section 251(h) is not available, or where the acquiror and the lenders have other concerns, the parties may prefer a one-step merger structure over a two-step tender offer structure in a leveraged transaction.

SEC Disclosure and Extension Requirements. Additionally, in connection with tender offers, the SEC staff has taken the position that fulfillment of a financing condition is a material event that must be disclosed to target company stockholders. To ensure compliance with the "reasonably designed" standard codified in the rule governing material changes in tender offers for cash-only consideration,[34] the staff has indicated that such material change should be disseminated at least five business days prior to closing the tender offer. Accounting for this potential contingency in a supplement to the Offer to Purchase can be cumbersome to address in drafting, and introduce risk if the financing for some reason becomes unavailable during the period between the fulfillment of the financing condition and the closing of the tender offer.[35]

Potential Change in Control Timing Concerns

In a negotiated two-step acquisition transaction, in the first-step tender offer the acquiror will acquire a majority of the shares of the target company. The target company thus will undergo a change in control, before proceeding to the second-step merger.

Such a change in control is consistent with the parties' overall intent, but the change in control may affect the target company's outstanding agreements (including internal plans such as option agreements) in a way that a merger would not, and may have implications under any antitakeover provisions of the target company's governing documents or applicable corporate statute. For example, a state corporate statute may impose obligations on the acquiror of a controlling or other specified block of shares, and may not provide for an exception in the context of a negotiated transaction, even if approved by the target company's board.[36]

Appraisal

Stockholders generally are entitled to seek appraisal in connection with a cash merger, if they follow appropriate procedures (including not voting to approve the merger and

34. Rule 14d-4(d)(1).

35. As of this writing, members of the SEC staff have stated publicly that they are reviewing their funding condition position, at least in the context of Section 251(h) mergers.

36. See the discussion of state antitakeover statutes in the Commentary to Section 3.18 of the Model Tender Offer Agreement. This issue does not arise as a statutory matter for Delaware corporations in negotiated transactions if proper steps are taken, since Delaware's antitakeover statute allows the target company board of directors to provide advance approval that avoids otherwise applicable restrictions. *See* DGCL § 203.

properly demanding appraisal for their shares).[37] Appraisal is not provided in connection with tender offers, though appraisal will be available in connection with the second-step merger for stockholders who do not tender; thus, as a practical matter appraisal rights generally are available in both merger structures and tender offer structures.

In an appraisal proceeding, the time for determining the fair value of target company stock is the closing of the merger, rather than signing of the acquisition agreement or closing of the tender offer. Delays between signing of the acquisition agreement and the closing of the merger (regardless of structure utilized) can give rise to differences in value. Use of a tender offer structure, when the potential speed of a tender offer is available, can decrease the amount of time between signing and closing of the merger. Conversely, if the parties need to go through a second-step merger approval process, the amount of time between the signing of the acquisition agreement and the closing of the merger may be increased, thus allowing more time for the valuation to change.

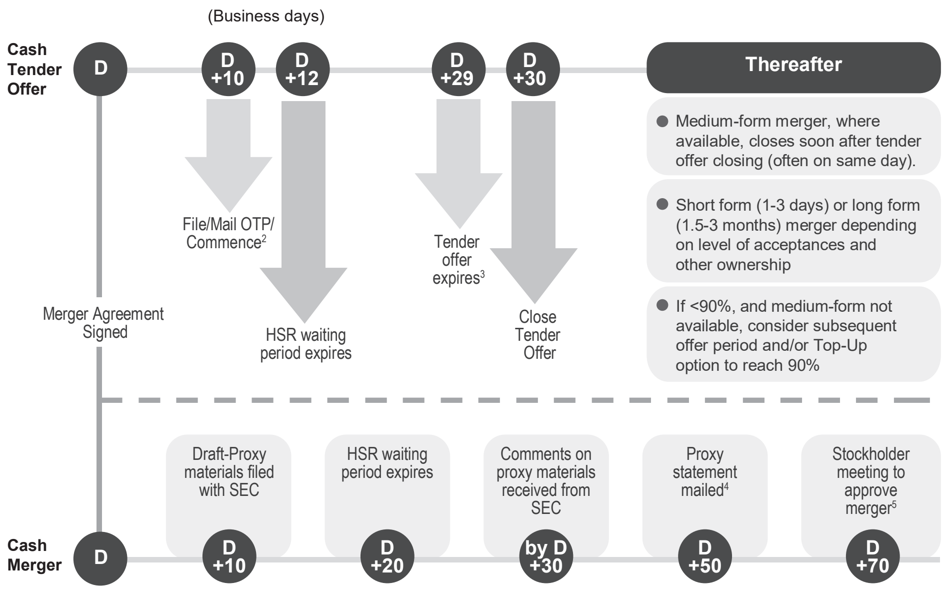
Dual Class Structures

Some corporations have two classes of stock outstanding – a high-vote stock and a low-vote stock. In many such corporations the high-vote stock converts into low-vote stock automatically upon certain events, which may include the transfer of such shares in a tender offer. Such a conversion might not be desirable for at least two reasons. First, it could make it more difficult to fulfill any statutory or contractual minimum tender (or vote) conditions. Second, if the conversion occurs but the transaction does not close, former holders of high-vote stock may be left in a different position than they were prior to the conversion. For these reasons, transaction planners might consider utilizing a one-step merger structure rather than a tender offer structure to avoid such a conversion.

37. *See, e.g.,* DGCL § 262.

The following chart illustrates the potential time differences.

Illustrative Timeline[1]



1. Timetables may vary considerably. Diagram is illustrative only.
2. 14D-9 is due 10 business days after commencement, but in negotiated deals is almost always mailed with offer document.
3. Tender offer can expire on 20th business day after commencement. Actual expiration and closing assume absence of regulatory delay and satisfaction of other conditions.
4. If SEC declines to review, mail proxy statement at D+18.
5. If SEC declines to review, hold meeting at D+40.