

Committee Chair's Preface

With over 5,000 members, the Business Law Section's Mergers and Acquisitions Committee is the world's largest forum for M&A lawyers and one of the most dynamic committees of the American Bar Association. Anchored by three in-person meetings each year, our Committee is a leading light at the strategic corner of "what you know" and "who you know."

But our work does not end with our meetings. From groundbreaking model acquisition agreements and annual deal points studies to insightfully practical case studies and an M&A lawyers' library, our Committee consistently publishes thought-leading content that is uniquely beneficial to our members as well as the deal making community as a whole.

Although *quantity* of publications is a nice benchmark, it is the *quality* of our publications that truly sets us apart. Our publications are subject to multiple peer reviews by leading practitioners and multiple rounds of editing. As a result, these publications are practical, well-regarded and oft-cited, including by members of the judiciary.

The Model Tender Offer Agreement is no exception. It was borne of a Task Force of our Committee's Acquisitions of Public Companies Subcommittee that was created in 2011, as that same Subcommittee was finishing work on its Model Merger Agreement. The Task Force members worked with each other and with others, both in-person in conjunction with our broader Committee meetings, and in between meetings through emails and phone, to create the thought-leading product you hold today. I thank the many Task Force members for their countless volunteer hours in preparing this document and, in particular, Mike O'Bryan and Eric Klinger-Wilensky, the Task Force chairs, for leading the way.

This publication does not simply contain model provisions. It also includes insightful and practical commentary describing those provisions, the legal considerations behind them, and potential negotiating positions and alternative drafts that might be posed by a

Model Tender Offer Agreement

transaction planner. I am confident that you will find it useful in your practice. And, if you find this or our other publications useful, I hope you will consider becoming an active member of our Committee.

Wilson Chu
Dallas, TX
Chair
Mergers and Acquisitions Committee

Task Force Chairs’ Preface

Fifteen years ago, the use of tender offers in negotiated acquisitions was relatively uncommon. As discussed in the Introduction, that began to change after the end of 2006, when the SEC amended its best price rule in a way that addressed concerns by potential buyers over the scope of that rule. The use of tender offers was further facilitated in 2013, when Delaware adopted Section 251(h) of the Delaware General Corporation Law.

Recognizing the renewed interest in tender offers, and the need to collect practical guidance on how tender offers might differ from other tools in a lawyer’s kit, the Mergers and Acquisitions Committee of the ABA’s Business Law Section created a Task Force on Tender Offers. Mike was a founding co-chair, along with Rick Alexander, and Eric stepped in when Rick stepped down. The Task Force’s mandate was to create a model agreement, and perhaps more importantly explanatory commentary, similar to the ABA’s Model Merger Agreement, but for an acquisition via a two-step tender offer. In light of the many securities rules that apply to tender offers, we also recruited to the Task Force members of the Business Law Section’s Federal Regulation of Securities Committee.

Our role in this project has been as co-chairs of a *Task Force*. That Task Force was comprised of many practitioners, each of whom drafted or reviewed large portions of this text and otherwise lent their expertise to this project through calls, emails and in-person meetings. Although there are too many contributors to mention them all, we are particularly grateful to members of the Editorial Board, who were leaders in drafting and peer reviewing the document:

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| Jay Bothwick | Boston, MA |
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We're also excited and grateful to have received comments from Ted Yu, Nick Panos and Perry Hindlin, all of the SEC's Office of Mergers and Acquisitions, on some of the federal securities rules commentary. Of course, their comments represent only their own views, and not necessarily those of the SEC or other members of its staff, and the SEC disclaims responsibility for any private publication or statement of any SEC employee or commissioner.

When this project was near-complete, Jim Griffin and Diane Holt Frankle provided front-to-back reads which resulted in a more polished product. We thank them very much for their thoughts and guidance. We also thank Jason Schoenberg, who tirelessly and without fail researched case law and precedent transactions, edited text and generally became an indispensable part of the project.

This project has been an *endeavor of love* for us. It has been an *endeavor* in that we have spent evenings, weekends and holidays over the better part of the last decade working on this product. For that, we thank our respective spouses, Masako and Kurt, and children, Naoki, Makiko, Gretchen and Daniel for supporting our work on this, which of course was on top of our day jobs. It has been one of *love* because, through this process, we were able to collaborate with each other and with so many incredible lawyers. For that we thank, in addition to all the Task Force members, former Mergers and Acquisitions Committee chair Scott Whittaker and current chair Wilson Chu for allowing us to lead this project and for the support they provided as year after calendar year flipped to the next.

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| Mike O'Bryan | Eric S. Klinger-Wilensky |
| San Francisco, CA | Wilmington, DE |

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