FROM THE CHAIR
By Joel I. Greenberg

Our Committee’s Spring 2007 meeting will be held in conjunction with the Business Law Section’s Spring Meeting on March 15 through March 17, at the Renaissance Washington, D.C. Hotel. Friday and Saturday morning will be devoted to programs and separate subcommittee, task force and working group meetings. The full Committee meeting will be held Saturday afternoon, starting at 12:30 p.m., and the Committee Forum will follow at 3:00 p.m. The Programs Subcommittee report, which begins on page 27 of this issue of Deal Points, includes a description of the Committee Forum and the programs that the Committee is sponsoring at the Spring Meeting.

The agenda for the full Committee meeting includes discussions of recent case law developments and Rick Climan’s report on some interesting dialogue at the Northwestern University Securities Regulation Institute that was held in San Diego earlier this year. Immediately following the full Committee meeting, the Committee Forum will feature a presentation on CFIUS and other national security aspects of mergers and acquisitions.

The Committee dinner will be held Saturday night at the Army and Navy Club, 901 17th Street, N.W. (on Farragut Square), with cocktails beginning at 7:00 p.m. and dinner at 8:00 p.m. As Washington, D.C. is a fairly formal environment, the Club requests that men wear jackets and ties.

(continued on next page)
At our stand-alone meeting in Dallas last Fall, the virtual attendance at our full Committee meeting and Committee Forum was nearly as large as the in-person attendance. Over 100 members from a variety of countries and time zones were able to hear our proceedings through a conference telephone call and to download the written presentations from our website. We were unable to arrange similar access for the Spring Meeting, but have begun discussions with the Business Law Section leadership to provide remote access in the future.

Our efforts to showcase the Committee’s work product at law schools are continuing this year with presentations of a modified mock negotiation of selected provisions of the Model Stock Purchase Agreement at Columbia, Harvard, Stanford and UCLA law schools. The students receive the entire Model Stock Purchase Agreement without commentary, selected provisions of the agreement with commentary, and the Deal Points Private Target Study to illustrate how these negotiations might conclude in real transactions.

Our Committee will meet at the ABA Annual Meeting in San Francisco this summer from Friday, August 10, 2007 through Sunday, August 12, 2007. Our stand-alone meeting in the fall is scheduled for the Broadmoor Hotel in Colorado Springs, Colorado, from Friday, October 12, 2007 through Saturday, October 13, 2007. Our longest running CLE program, the National Institute on Negotiating Business Acquisitions, will return to New Orleans this year. It will be held at the Windsor Court Hotel from Thursday, November 1, 2007 through Friday, November 2, 2007.

I welcome your continuing input and feedback on our Committee and its activities. Please contact me with any observations and suggestions. I look forward to seeing many of you in Washington, D.C.

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**FEATURE ARTICLES**

**PRACTICAL IMPLICATIONS OF THE SEC’S AMENDMENTS TO THE TENDER OFFER BEST-PRICE RULE**

By Alexander B. Johnson

The recent amendments to the tender offer “best-price rule” – which addressed a significant deterrent to the structuring of transactions as tender offers – became effective on December 8, 2006, and, since that time, the number of U.S. M&A transactions structured as tender offers already appears to be on the rise. Not only have there been more tender offers during the few months following the rule’s effectiveness relative to the same period last year, but also practitioners structuring M&A transactions appear to be discussing the tender offer alternative with a renewed frequency that has not existed for quite some time.

This article reviews the background of the rule, describes the recent amendments and includes suggestions for compliance. This article then discusses certain practical implications of the rule, including some considerations for effecting transactions as tender offers or exchange offers in light of the expected increase in M&A transactions so structured.

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2 Source: Bloomberg.
I. Background.

The SEC adopted the best-price rule for tender offers 20 years ago to help address unfair and discriminatory practices in the pricing of tender offers. Prior to its recent amendments, the best-price rule (Exchange Act Rule 14d-10(a)(2) for third-party tender offers) provided that no bidder shall “make a tender offer unless: . . . [t]he consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.” Although the best-price rule extends to tender offers by issuers for their own securities, the controversy surrounding the rule’s application has arisen principally in the context of third-party tender offers.

Over the years, various payment arrangements between the bidder and security holders of the target company have been challenged as disguised tender offer consideration that violates the best-price rule. The most common types of challenged arrangements have involved the grant or acceleration of stock options and other incentive award payments, “golden parachutes” and other change-of-control agreements, non-competition agreements, and other standard employment arrangements, or modifications to such arrangements. The plaintiffs in these lawsuits also have attacked commercial arrangements, such as product distribution agreements, involving target company security holders.

In deciding these challenges, federal courts generally applied two different tests. Courts applying the so-called “integral-part test” ruled that the best-price rule applies to all integral elements of a tender offer, including compensatory and commercial arrangements that are deemed to be part of the tender offer, regardless of whether the arrangements are executed and performed outside of the time that the tender offer formally commences and expires. Other federal courts used a “bright-line test” that applies the best-price rule solely to arrangements executed and performed between the time a tender offer formally commences and expires. Under either test, however, a bidder that violates the best-price rule may be liable to pay the highest per-share value of the offending arrangement to all security holders. The per-share value could amount to a significant multiple of the announced tender offer price, especially if the recipients of substantial payments hold only a small portion of the shares eligible to be tendered.

In view of this potentially significant liability and the conflicting judicial interpretations regarding the reach of the best-price rule, many parties to business combinations refrained from structuring their transactions as tender offers prior to the recent amendments. Instead, particularly where the retention of employees or the execution of severance or other compensatory arrangements have been important to the transaction, buyers have elected to complete their acquisitions as one-step mergers, which are not subject to the best-price rule, even when a tender offer otherwise might have been a more advantageous structure.

II. Amendments to the Best-Price Rule and the Safe Harbor.

In fashioning the amended rule, the SEC specifically declined to endorse the approach of either the integral-part test, which it believed would be too expansive, or the bright-line test, which it believed would compromise the protections of the rule by limiting its application to an artificially defined tender offer period. Instead, the amendments reflect the SEC’s position that the best-price rule should apply solely to consideration paid for securities tendered in the tender offer and should not encompass other payments to securities holders that were not made to acquire their securities.

Revisions to the Best-Price Rule. The amendments revise the best-price rule for both third-party and issuer tender offers to provide that a bidder may not make a tender offer unless “[t]he consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.” The clause “for securities tendered in the tender offer” replaces the clauses “pursuant to the tender offer” and “during such tender offer,” respectively, in the old rule. This change clarifies that the best-price rule applies only to the consideration paid for securities tendered and does not apply to consideration paid for other purposes, such as under compensatory arrangements.

Exemption for Certain Arrangements. Recognizing the concerns raised by the best-price rule’s potential application to compensatory arrangements, the SEC supplemented the foregoing amendment by adding new Rule 14d-10(d)(1) for third-party tender offers and new Rule 13e-4(f)(12)(i) for issuer tender offers. So long as two conditions are met, the new provision will exempt from the best-price rule the “negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement, or payments made or to be made or benefits granted or to be granted according to such an arrangement, with respect to any security holder” of the target company. To qualify for the exemption, the amounts payable by the covered arrangement must:

- be paid or granted as compensation for (i) past services performed, (ii) future services to be performed or (iii) future services to be refrained from being performed (as in the case of a non-competition agreement) by the security holder, and matters incidental to the foregoing; and

- not be calculated based on the number of securities tendered or to be tendered in the tender offer by the security holder.

The SEC also made a number of changes to the exemption based on comments to its proposals. In one change, the SEC expanded the proposed exemption for compensatory arrangements entered into with employees or directors of the target company to include compensatory arrangements entered into with any security holder of the target company. The SEC also expanded the proposed exemption (and the safe harbor discussed below) to encompass issuer tender offers in addition to third-party tender offers. The latter change eliminates uncertainty that might have developed if the SEC had not specifically addressed issuer tender offers in these exemptions.

Safe Harbor. The SEC rounded out the exemption for compensatory arrangements by adding a non-exclusive safe harbor in new Rule 14d-10(d)(2) for third-party tender offers and new Rule 13e-4(f)(12)(ii) for issuer tender offers. The safe harbor provides that employment compensation, severance and other employee benefit arrangements will be exempt from the best-price rule if they are approved solely by the target company’s (or issuer’s) independent directors. The safe harbor also will be available in a third-party tender offer if the compensatory arrangements are approved by the bidder’s independent directors (if the bidder is a party to the arrangements). The comparable safe harbor for issuer tender offers applies if the compensatory arrangements are approved by the independent directors of the issuer’s affiliate (if the affiliate is a party to the arrangements).

Under both safe harbors, the arrangements must be approved either by the approving entity’s compensation committee or by a committee that performs similar functions. If the approving entity does not have such a committee, or if the members of those committees are not all independent, compensatory arrangements will be exempt from the best-price rule if they are approved by a special board committee composed solely of independent directors formed to consider and approve the arrangements.
To determine the independence of directors serving on the approving committee, a company with securities listed on a registered national securities exchange must use compensation committee independence standards as defined in the applicable listing standards. A non-listed company must use a definition of independence of a selected securities exchange and must apply the definition consistently for all committee members. The SEC also added a helpful instruction to the safe harbor indicating that a determination by the approving entity’s board of directors that each member of the approving committee is independent in accordance with the provisions of the safe harbor will satisfy the safe harbor’s independence requirements.

Foreign private issuers may have the compensatory arrangement approved by any or all members of the board of directors or any board committee of the approving entity authorized to approve the arrangement under the laws or regulations of their home country. These issuers also will have the flexibility to determine director independence in accordance with the U.S. listing standards described above. The SEC acknowledges and accommodates for the fact that foreign private issuers may not have compensation or similar committees and may not be subject to the independence provisions of U.S. listing standards.

**Complying with the Amended Rule, Exemption and Safe Harbor.** While the amendments, exemption and safe harbor taken together are well-designed to achieve the desired effect, plaintiffs may nonetheless choose to focus their efforts on tender offers that do not strictly comply with such provisions. As such, parties must carefully consider and strictly comply with the amended rule, exemption and safe harbor in effecting transactions as tender offers. A few examples to illustrate certain possible concerns and pitfalls:

**Adequacy of Approval Process.** It is critical that the compensation committee (or other appropriate independent committee) properly approves the employment compensation, severance or other employee benefit arrangements in question. In this regard, the SEC’s adopting release indicates that directors would need to have knowledge of the specific arrangements and the related tender offer when their approval is given. In other words, directors should approve the arrangements in connection with a pending transaction after considering the safe harbor, since mere advance approval of a compensatory arrangement (e.g., routine board approval of an incentive plan or an employment agreement outside the context of an offer) may not suffice.

**Ensuring the Target’s Compliance.** In addition to the need for targets to carefully comply, bidders should monitor and ensure such compliance. In that regard, bidders may wish to review target board resolutions and obtain specific representations and warranties and covenants regarding compliance. Indeed, even though the revised rule has only been effective for a few months, a number of tender offer merger agreements have already included such provisions.

**Conditional Arrangements.** While the amendments strive to eliminate certain unintended consequences of the rule’s application, its basic tenets still apply. Accordingly, certain arrangements must be carefully tailored to avoid falling back into the rule’s prohibitions where the availability of the exemption will be lost. In that regard, the SEC’s adopting release notes that conditioning arrangements on a security holder tendering in the tender offer would most likely violate the amended rule, but merely conditioning arrangements on the tender offer being completed (without any requirement to tender) should not be problematic.
Non Tendering Shareholders; Other Rules. While the best-price rule is not applicable to shareholders who do not tender, that fact by itself is not a license to enter into arrangements with non-tendering security holders. For example, if the arrangement involves some type of consideration for shares, Rule 14e-5 – which prohibits purchases outside the tender offer – may nonetheless apply.

III. Practical Implications of the Amended Best-Price Rule.

Increase in Consensual Tender Offers. The most notable ramification of the best-price rule amendments is the expected resurgence in tender offers. This is the case because the risk of litigation with respect to employee benefit arrangements should be significantly reduced under the new rules, thus making tender offers again an attractive acquisition method. As a result, more parties already appear to be giving greater consideration to the advantages of using tender offers relative to one-step mergers, some of which are discussed below.

Timing Considerations. With the litigation risks minimized, the principal reason for the attractiveness of tender offers is the timing advantage relative to one-step mergers. Tender offers typically can be completed as quickly as 20 business days after the offer formally begins, assuming no regulatory or other constraints. Moreover, if sufficient shares (90% in Delaware) are purchased to permit a bidder to complete a “short-form” merger, the acquisition of 100% of the target typically can be consummated promptly after the offer is completed.

In addition, the overall SEC review process in tender offers adds to the timing advantage. Under SEC rules, a bidder may initiate a cash tender offer without first filing and clearing documents with the SEC; a merger proxy, on the other hand, typically cannot be mailed until it has first been cleared. Moreover, in light of the typically more streamlined disclosure documents in a tender offer, combined with the SEC review process occurring while the offer is pending, tender offers often result in a faster SEC process overall than is the case in one-step mergers.

Notwithstanding this timing advantage, a one-step merger structure may nevertheless be preferable if the overall timing of the transaction is dictated by regulatory or other considerations. This is the case because a tender offer (typically along with attendant withdrawal rights) would have to be extended continuously until regulatory approvals are obtained, thereby leaving one of the key hurdles in many M&A transactions – shareholder acceptance – open for an extended period of time. By contrast, in a merger, shareholder acceptance occurs by virtue of the shareholder vote on the transaction, which vote could happen well before receipt of regulatory approvals. In addition to the obvious benefit of overcoming this important hurdle sooner rather than later, obtaining shareholder approval as early as possible in the transaction is an important safeguard against the possibility of losing the deal to a competing acquisition proposal (since such possibility would typically terminate once shareholder approval is obtained).

Ability to Effect a Short-Form Merger. As noted above, a key component of the tender offer timing advantage is the ability to effect a “short-form” merger, and thereby acquire 100% of the target company promptly following expiration of the initial 20 business day period. Should a bidder fail to acquire the requisite number of shares for a short-form merger (90% in Delaware), it may nonetheless acquire the tendered shares and own less than 100% of the company. While a tender offer would typically contain a minimum condition such that following the offer, the bidder would be vested with sufficient shares to control the outcome of a shareholder vote on the second-step merger, the process of preparing a disclosure document and calling a meeting to vote on a merger whereby the bidder would acquire the remaining untendered shares could take months –
in other words, close to the timetable had the transaction been structured as a one-step merger. That said, absent shareholder opposition to the transaction, in a tender offer where the minimum condition is satisfied, it would be unusual for the bidder not to also be able to obtain sufficient shares to effect a short-form merger.

**Maximizing the Ability to Effect a Short-Form Merger.** In light of the importance of being able to effect a short-form merger, the bidder will often include a permitted subsequent offering period (during which withdrawal rights do not apply), pursuant to Rule 14d-11, following the consummation of the tender offer. The rationale is that shareholders that have not tendered into the offer, when faced with the prospect of receiving promptly the same consideration if they tender during the subsequent offering or receiving it months later following a shareholder approved merger, would typically prefer the former.

Another more increasingly-used feature is the so-called top-up option. Here, the target would grant the bidder an option to purchase additional shares in order to reach the requisite short-form threshold (e.g., 90% in Delaware). This feature can provide a significant benefit, but nonetheless requires consideration of a number of factors – not the least of which is the potentially large number of shares required to be issued for the top-up option to be effective (in light of the resulting increase to both the numerator and the denominator in any share calculation). As a result, any significant issuances could come up against authorized share limitations in the target’s charter and stock exchange shareholder vote requirements.

One recent (and notably less typical) variant of the top-up option would be for the target to grant bidder the option in certain circumstances to obtain the requisite number of shares to obtain mere control (as opposed to 90% for a short-form). Such circumstances could include, for example, if the bidder would have otherwise succeeded in obtaining 50.1%, but for dilution resulting from pre-closing option exercises. The top-up option in this circumstance would require the target to issue sufficient shares to the bidder so that it could obtain the requisite 50.1% merger vote. While this may seem appealing, in addition to the considerations raised by the more typical 90% top-up option, this feature raises a host of additional concerns – most notably, significant fiduciary duty considerations – all of which have likely led to its limited use.

**Appraisal Rights.** In a merger, demands for appraisal under the Delaware statute would typically occur pre-stockholder vote (assuming action is taken at a meeting as opposed to by written consent). Conversely, such demands in a two-step tender offer structure are not due until there is a subsequent back-end merger. As such, while a one-step merger could have a maximum dissenters condition if the circumstances warranted, the Delaware statute would not apply to a tender offer itself. Further, while the risk of appraisal rights in a second-step merger following the tender offer could potentially be minimized via a high minimum condition in the tender offer itself (as tendering shareholders typically could not exercise appraisal rights), such a high condition might not otherwise be appropriate or acceptable in the context of the overall transaction.

**Private Equity Considerations.** Private equity firms structuring transactions as tender offers will have additional considerations, and, as a result, it remains to be seen whether the expected rise in tender offers will extend (or at least extend as dramatically) to private equity buyers. The most notable of these considerations is compliance with the margin rules. The Federal Reserve Board’s Margin Rules prohibit a bank or non-bank lender from extending credit for the purpose of purchasing “margin stock” (generally publicly traded stock) unless the amount of credit does not exceed 50% of the market value of the stock. While this by itself does not preclude private equity buyers from using typical leverage ratios in tender offers, it does drive financing structures
towards unsecured bridge loans or more creative structures, such as effecting the transaction by means of a joint issuer and third-party tender offer whereby debt is secured at the target obligor level.

In addition to financing, other considerations include making sure that the applicable transaction and financing structure complies with the private equity buyer’s fund documents. Moreover, while the revised best-price rule is designed to address the old rule’s unintended application to compensation arrangements, the interplay between private equity compensation arrangements, rollovers or partial rollovers of equity and any support and/or lock up agreements from shareholders (including, for that matter, in non-private equity transactions) nonetheless warrant careful consideration, including implications under Rule 14e-5 and the ability to effect a short-form merger.

Notwithstanding these additional considerations, a private equity buyer with no regulatory considerations, for example, may be able to use a tender offer to add to the timing advantage that it would likely already have over a strategic buyer with such regulatory issues, thereby making its transaction potentially more attractive to the target company.

Exchange Offers. Prior to Regulation M-A going into effect in early 2000, cash tender offers had a clear timing advantage over exchange offers, with exchange offer timing being closer to that of a one-step merger in light of the then-inability to commence an exchange offer until registration statement effectiveness. Regulation M-A changed that requirement so as to permit an exchange offer to be commenced upon filing of the registration statement for the transaction. As a result, while an exchange offer registration statement and related offer documentation are far less streamlined (and thus may take longer to prepare) than cash tender offer documents, the combination of (i) the SEC’s willingness to permit early commencement of exchange offers upon filing, and (ii) the commitment from the SEC staff for expedited exchange offer review, should put the two on at least closer footing. Because the “fast track” exchange offer rules came into existence around the same time that the best-price rule was having a chilling effect on tender offers, bidders’ reluctance towards tender offers translated into the same reluctance towards exchange offers such that the fast track exchange offer never gained widespread usage. As such, in addition to a resurgence in cash tender offers, an increase in stock-for-stock transactions effected as exchange offers also seems likely.

**Conclusion**

The amendments to the best-price rule represent an important step forward in removing a major impediment to the use of tender offers in business combinations where there is payment of compensation to certain security holders. Adoption of the new rules, together with the fact that a tender offer or exchange offer coupled with a short-form back-end merger may be completed more quickly and efficiently than a one-step merger, should result in an increase in tender offers and exchange offers as acquisition structures – something that already appears to be happening.
I. Deal Protection Generally.

Generally speaking, deal protection measures are designed to address the risk of outside interference between the signing of a merger agreement and the closing of the merger. Typical deal protections include provisions prohibiting or restricting the solicitation of competing transactions and restricting the manner in which a party may permissibly respond to unsolicited competing proposals, as well as provisions that compensate one party or the other should the deal collapse under the weight of outside interference. From a buyer’s perspective, deal protections that restrict the seller’s ability to pursue other alternatives are necessary because the buyer will have invested significant time and resources, will have incurred substantial expenses, and will necessarily have foregone other potential opportunities in pursuing and committing to the transaction. The last thing a buyer wants is to be a “stalking horse” for competing proposals to acquire the seller, and without contractual deal protections a buyer would be far less willing to incur the burden and expense required to get the deal done.

A seller’s board, on the other hand, will ordinarily seek to limit the scope of such deal protection provisions and to retain sufficient flexibility to evaluate and act upon late arriving offers and other changed circumstances that could impact whether the deal remains advisable. At the same time, the seller (like the buyer) has an incentive to seek deal protections that will enhance deal certainty and ensure that the buyer closes the deal. While the buyer does not want to be a “stalking horse,” the seller does not want to be “put in play” and then lose its preferred deal simply because the buyer develops a case of cold feet.

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II. The Fiduciary Obligations of a Seller’s Board.

Directors of selling corporations and their counsel have long been sensitive to fiduciary limitations on the permissible scope of deal protections applicable to the seller. It is now generally understood that the fiduciary duties of the seller’s board do not end with the signing of a merger agreement. Rather, the directors must retain the contractual flexibility to evaluate and possibly act upon competing offers and to keep stockholders informed as to all material matters pertaining to their vote.3

When stockholders challenge deal protection measures that arguably deter competing proposals to acquire the selling corporation, a Delaware court will closely scrutinize such measures for their reasonableness, consistent with the so-called *Unocal*4 standard of review.5 While that enhanced form of reasonableness review does not mean that a Delaware court will second-guess the good faith decisions of a seller’s board in agreeing to specific deal protection provisions, it typically does involve a careful and contextually-specific assessment by the court as to whether the provisions at issue fall within a range of reasonableness in view of the particular circumstances facing the seller when the deal was signed.6 Where a seller’s board “has actively canvassed the market, negotiated with various bidders in a competitive environment, and believes that the necessity to close a transaction requires that the sales contest end,” more restrictive deal protection measures may be warranted.7 However, “where a board has not explored the marketplace with confidence and is negotiating a deal that requires stockholder approval and would result in a change in

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3 See, e.g., Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 936 (Del. 2003) (holding that combination of deal protection measures in a merger agreement operated in tandem to irrevocably “lock-up” the merger and to preclude the target board from exercising its ongoing obligation to consider and accept higher bids and finding that such deal protection provisions “completely prevented the board from discharging its fiduciary responsibilities to the minority stockholders when Omnicare presented its superior transaction.”); Frontier Oil Corp. v. Holly Corp., 2005 WL 1039027 (Del. Ch. Apr. 29, 2005) (discussed below); Phelps Dodge Corp. v. Cyprus Minerals Co./Asarco Inc., 1999 WL 1054255, *2 (Del. Ch. Sept. 27, 1999) (Bench ruling) (finding that a “no talk” provision was the “legal equivalent of willful blindness, a blindness that may constitute a breach of a board’s duty of care; that is, the duty to take care to be informed of all material information reasonably available.”). Significantly, once the stockholders have approved a merger, the target board ordinarily has no further duty to consider competing bids. See *In re Mobile Commc’n Corp. of Am., Inc. Consol. Litig.*, 1991 WL 1392, at *7 (Del. Ch. Jan. 7, 1991).


5 See, e.g., Omnicare, 818 A.2d at 934 (finding that deal protection measures designed to provide deal certainty for a buyer are defensive devices that “are subject to enhanced judicial scrutiny under a *Unocal* analysis”); *In re Toys “R” Us, Inc. S’holder Litig.*, 877 A.2d 975, 1015 (Del. Ch. 2005) (engaging in the “close examination of the reasonableness of deal protections measures that is contemplated by the *Unocal* and *Revlon* standards”); see also *McMillan v. Intercargo Corp.*, 768 A.2d 492, 506 n.62 (Del. Ch. 2000); *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 108 (Del. Ch. 1999).

6 See, e.g., *In re Toys “R” Us*, 877 A.2d at 1015-16 (explaining that Delaware courts will engage in a context specific analysis of deal protection measures in an effort to determine, under the particular facts presented, whether the target board acted reasonably in accepting the deal protection devices at issue); see also *Louisiana Municipal Police Employees’ Retirement System v. Crawford*, 2007 WL 582510, at *4 n.10 (Del. Ch. Feb. 23, 2007). Note, however, that the Delaware Supreme Court has held that certain deal protection measures (e.g., those that result in a *fait accompli*) might be *per se* invalid under Delaware law. See *Omnicare*, 818 A.2d at 936.

7 *Ace*, 747 A.2d at 107 n.36.
stockholder ownership interests, a board’s decision to preclude itself . . . from entertaining other offers is less justifiable.\textsuperscript{8}

In its relatively recent decision in \textit{Frontier Oil Corporation v. Holly Corporation},\textsuperscript{9} the Delaware Court of Chancery suggested that, regardless of the particular context (e.g., the extent of the market canvass or the negotiating history between the parties), a merger agreement cannot restrict the fiduciary duty of the seller’s board to reassess its recommendation to stockholders if circumstances change and to withdraw or modify that recommendation, if warranted, before the seller stockholder vote. \textit{Frontier Oil} involved a merger agreement pursuant to which shares of the selling corporation would be converted into a mix of cash and buyer’s stock. Following the execution of the merger agreement, it became apparent to the seller’s board that certain potential liabilities of the buyer could have a significant impact on the value of the stock consideration to be received by the seller’s stockholders in the merger. As a result, the seller indicated that it was reluctant to proceed with the transaction unless the merger agreement was amended to account for the increased liability.\textsuperscript{10} In response, the buyer commenced suit, contending that the seller had repudiated and thus breached the merger agreement. In rejecting the buyer’s repudiation claim, the Court of Chancery found that the seller’s statements did not rise to the level of a repudiation but, rather, amounted to no more than a suggestion that the seller’s board would no longer recommend the transaction to its stockholders in the absence of modifications to the merger agreement. The Court emphasized that the merger agreement specifically contemplated that the seller could change its recommendation to stockholders prior to their vote, in which case the buyer would have had a termination right and might also have been entitled to a termination fee. Most importantly, for purposes of the present discussion, the Court stated that “[r]evisting the commitment to recommend the Merger was not merely something that the Merger Agreement allowed the Holly Board to do; it was the duty of the Holly Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties.”\textsuperscript{11} As discussed below, that principle should be equally applicable to a buyer’s board.

\section*{III. The Fiduciary Obligations of a Buyer’s Board.}

As noted, there is little case law or legal commentary specifically focusing on the fiduciary obligations of a buyer’s board when approving an acquisition agreement and related deal protection provisions applicable to the buyer. Some guidance, however, can be gleaned from the case law dealing with the fiduciary duties of a seller’s board.

For example, although \textit{Frontier Oil} addressed the fiduciary duties of a seller’s board to continue to assess its recommendation to stockholders prior to a stockholder vote, the authors believe that a buyer’s board should be guided by the same principles in connection with any transaction in which a vote of the buyer’s stockholders is required (whether by state corporate law, stock exchange rules, or otherwise). The reason a board (be it a seller or buyer board) has a fiduciary obligation to reassess its recommendation to stockholders in view of changed circumstances is that the directors have

\textsuperscript{8} Id.

\textsuperscript{9} 2005 WL 1039027 (Del. Ch. Apr. 29, 2005).

\textsuperscript{10} The seller also was informed by its financial advisor that it had significantly undervalued certain of its assets and, therefore, the buyer had struck “a good, perhaps too good of a, deal.” 2005 WL 1039027, at *11.

\textsuperscript{11} Id. at *28 (emphasis added).
an obligation to keep stockholders fully informed with respect to matters on which they are requested to vote and must ensure that disclosures to stockholders remain truthful and not misleading. In that context, a buyer’s board has no less an obligation to be truthful than does a seller’s board.

The Delaware Court of Chancery’s recent decision in Stone Energy, which dealt squarely with merger agreement restrictions on a buyer’s conduct, provides some further guidance. While on one level, Stone Energy can be viewed as a straight-forward contract construction decision, the Court’s analysis also has important implications with respect to the fiduciary obligations of a buyer’s board of directors when entering into an acquisition agreement that contains deal protection measures designed to enhance deal certainty for the seller.

In Stone Energy, the Court of Chancery considered whether a restrictive covenant in a merger agreement should be construed to limit the ability of the buyer to engage in discussions with a third party bidder interested in acquiring the buyer. The proposed merger was structured as a stock for stock deal in which a vote of the buyer’s stockholders was required by the rules of the national securities exchange on which the buyer’s shares were listed. The covenant at issue was set forth in Section 6.2(e) of the merger agreement (“Section 6.2”), which provided, in pertinent part, that:

Except as expressly permitted or required by this Agreement, prior to the Effective Time, neither [buyer] nor any of its Subsidiaries, without the prior written consent of [seller], shall:

(e) knowingly take, or agree to commit to take, any action that would or would reasonably be expected to result in the failure of a condition set forth in Sections 8.1, 8.2, or 8.3 [conditions to consummation of the merger] … or that would reasonably be expected to materially impair the ability of [seller], [buyer], Merger Sub, or the holders of Target Common Shares to consummate the Merger in accordance with the terms hereof or materially delay such consummation . . . .

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Following the execution of the merger agreement, a third party announced a hostile tender offer to acquire control of the buyer. As a result, a dispute arose between the buyer and the seller about the effect of Section 6.2. The buyer argued that the restrictive covenant in Section 6.2 should not be construed as a form of “no shop” provision because the buyer specifically refused to agree to a reciprocal “no shop” provision when it negotiated with the seller. Accordingly, while the merger agreement contained a standard “no shop” provision restricting the activities of the seller, it did not include a similar provision restricting the activities of the buyer. The buyer also argued that the parties had not intended for Section 6.2 to apply to the buyer’s consideration of strategic alternatives. If it did, the buyer asserted, then such a provision would operate as a strict “no talk” provision and would be invalid as a matter of Delaware law because it would unconditionally preclude the buyer’s board from communicating with potential acquirers and thus prevent the buyer’s directors from fulfilling their fiduciary duties.

By contrast, the seller argued that Section 6.2 operated as written, and would not unduly restrict the buyer’s activities so long as any negotiations, recommendations, or third party agreement did not materially delay or impair the merger. The seller argued, therefore, that the buyer was not unconditionally precluded from talking to third parties.

The Court interpreted the merger agreement in accordance with settled contract

2006 WL 29473483, at *2.
interpretation principles and found that the restrictions in Section 6.2 did not prevent the buyer from exploring the third party’s proposal to acquire the buyer. Reading the merger agreement in its entirety, the Court found that several other provisions of the merger agreement supported its construction. In particular, the merger agreement recognized that the buyer might withdraw or modify its recommendation in response to a “Third Party Acquisition Proposal.” In the event that the buyer were to do so, the merger agreement provided the seller with a remedy – i.e., the right to terminate the merger agreement and to collect a termination fee. Therefore, the Court concluded that “the provisions indicate that the parties contemplated that just such an event as the [third party tender offer] might occur and that in reference to it, [the buyer’s] board, consistent with its fiduciary obligations, could investigate or pursue the Third Party Acquisition Proposal and potentially recommend against the . . . Merger.”

The Court also found support for its conclusion in the relevant extrinsic evidence and Delaware fiduciary duty law. As for the latter, the Court deemed the reasoning of Ace Limited v. Capital Re Corporation to be persuasive, and determined that Section 6.2 should be construed consistently with the parties’ understanding of the board’s fiduciary duties. The Court reasoned as follows:

In interpreting the ACE-Capital Re merger agreement, the Court recognized that the parties to the transaction were aware of the scope of the directors’ fiduciary duties and, in effect, construed the provisions of the agreement consistent with those duties. This conclusion comports with the record established in this case in terms of the . . . merger…. Accordingly, the Court construes the . . . Merger Agreement, in general, and Section 6.2(e), in particular, as being consistent with that understanding and permitting [buyer] to explore Third Party Acquisition Proposals, as long as it does so in good faith.

The Stone Energy decision thus appears to confirm that the rationale of Frontier Oil – which dealt with a board’s fiduciary obligation to reassess its recommendation to stockholders in view of changed circumstances – applies equally to a buyer’s board of directors when a vote of the buyer’s stockholders is required. But the Stone Energy decision also appears to take the rationale of Frontier Oil a step further. Stone Energy suggests that, in the circumstances there presented, the parties properly understood when they entered into the merger agreement that the buyer’s board of directors had a fiduciary obligation to ensure that the agreed-upon provisions of the merger agreement would not unreasonably restrict its ability to explore third-party proposals to acquire the buyer, even if the pursuit of such a proposal might require the buyer’s board to change its recommendation to stockholders with respect to the merger.

IV. Implications for Negotiated Acquisitions.

Based on the reasoning of both Frontier Oil and Stone Energy, it now seems clear that a board of directors – whether that of a seller or that of a buyer – has an ongoing obligation after entering into a merger agreement to continue to assess its recommendation to stockholders in view of changed circumstances and that a board’s fiduciary obligations do not terminate merely because an agreement is signed. It further appears

13 In construing Section 6.2 in view of the merger agreement in its entirety, the Court referenced the preamble to Section 6.2, which contained the phrase “[e]xcept as expressly permitted or required by this Agreement . . . .” Id. at *14.

14 Id.

15 Id. (emphasis added).

16 747 A.2d 95 (Del. Ch. 1999).

17 2006 WL 2947483, at *16.
that there are some circumstances in which the board of directors of a buyer may, as a fiduciary matter, need to negotiate for appropriate contractual flexibility so that the merger agreement will not unreasonably deter, or preclude the buyer from exploring, potentially more favorable alternative transactions in which the buyer might seek to engage. Stone Energy does not, however, outline the circumstances in which a buyer’s board will have fiduciary obligations of that sort or the types of contractual provisions that will be deemed to provide sufficient flexibility so as to comport with such obligations.

In many situations, an acquisition agreement may contain few restrictions on a buyer’s conduct and possibly none that limit a buyer’s flexibility with respect to the pursuit of other transactions. Oftentimes such restrictions will be unnecessary because, as a practical matter, the particular acquisition will not materially impair the buyer’s ability to pursue other transactions, and the pursuit of other transactions will not materially impair the buyer’s ability to consummate the proposed acquisition. In other situations, however, the significant nature of an acquisition or the terms of an acquisition agreement might preclude or restrict a buyer’s conduct as it relates to the pursuit of alternatives.

It is therefore incumbent upon a buyer’s board of directors to carefully consider the impact (if any) that an acquisition (and the terms of an acquisition agreement) might have on the buyer’s ability to pursue other transactions and carry out its long-term plans. Of course, nearly any significant decision that a board of directors makes will necessarily restrict to some degree the corporation’s future flexibility with respect to alternative courses of conduct. As long as a decision to pursue a particular course of conduct is fully informed, however, it ordinarily will not be viewed as an abdication of future duty merely because such a decision effectively precludes or restricts other potentially available courses of conduct. In our view, that settled principle should be generally applicable in the context of a decision to acquire another company.

That said, the directors of a buyer also must recognize that an acquisition of another company is seldom an ordinary course transaction and that such a transaction might have a profound impact on the nature of the buyer’s business or might otherwise significantly affect stockholder ownership rights. The duties of care and loyalty will be particularly acute in that context. Just as

18 See Grimes v. Donald, 673 A.2d 1207, 1214-15 (Del. 1996) (“[B]usiness decisions are not an abdication of directorial authority merely because they limit a board’s freedom of future action. A board which has decided to manufacture bricks has less freedom to decide to make bottles. In a world of scarcity, a decision to do one thing will commit a board to a certain course of action and make it costly and difficult (indeed, sometimes impossible) to change course and do another. This is an inevitable fact of life and is not an abdication of directorial duty.”).

19 See Ace Ltd, 747 A.2d at 105, 108-09 (emphasizing the “special importance” of the fiduciary duties of care and loyalty in circumstances in which a board of directors is making a decision concerning stockholder ownership rights, in contrast to an “enterprise” decision, such as what product to manufacture) (citing Paul L. Regan, Great Expectations? A Contract Law Analysis For Preclusive Corporate Lock-Ups, 21 Cardoza L. Rev. 1 (1999)); Louden v. Archer-Daniels-Midland, 700 A.2d 135, 147 n.47 (Del. 1997) (“There is an analytical distinction between ‘ownership claim issues’ and ‘enterprise issues’ facing a board of directors. ‘Enterprise issues’ are usually those involving management decisions affecting the enterprise and do not go to the heart of the individual stockholder’s personal property interests. ‘Ownership claim issues’ involve board decisions that have an immediate and profound impact on stockholders’ rights.”); E. Norman Veasey, The Defining Tension in Corporate Governance in America, 52 Bus. Law. 393, 394 (1997) (“Enterprise issues raise questions such as: should we manufacture cars or widgets, and should the plant be in Perth or Pittsburgh? . . . There is little or no court interference in enterprise issues . . . . Ownership
directors of a selling corporation must be especially diligent and well-informed when making a decision to sell control of the company, directors of a buyer should be especially diligent when approving significant acquisitions that could implicate stockholder “ownership” rights – whether or not a stockholder vote on the transaction will be required.

If a buyer’s board of directors has carefully considered, in good faith, the impact that a particular acquisition might have on the buyer’s ability to pursue other courses of conduct in the future and concludes that, notwithstanding any such impact, the acquisition is in the best interests of the corporation and its stockholders, there is no reason to expect that such a decision would not ordinarily be respected by the Delaware courts. Where, however, a merger agreement contains deal protection measures restricting the buyer’s post-agreement conduct, the fiduciary duty analysis necessarily becomes more nuanced, especially where a vote of the buyer’s stockholders will be required. In fact, if a buyer’s stockholders were to challenge deal protection measures designed to restrict or deter potential alternative transactions in which the buyer might engage, a Delaware court may well scrutinize the board’s decision with respect to such provisions under a contextually-specific reasonableness analysis, as contemplated by Unocal, rather than applying the more deferential business judgment rule standard of review. Enhanced judicial scrutiny is particularly likely if deal protection measures impose restrictions on a buyer’s evaluation of alternatives in circumstances in which a vote of the buyer’s stockholders will be required. In that situation, we know from decisions such as Frontier Oil and Stone Energy that the buyer’s board, at the very least, must preserve the contractual freedom to reassess its recommendation to stockholders in view of any changed circumstances and to make full and truthful disclosure to its stockholders regarding such changed circumstances and their impact on the board’s recommendation.

In some circumstances, the duties of a buyer’s board might require the directors to negotiate for even more contractual flexibility. In keeping with the directors’ duty of care and their ongoing obligation to ensure that stockholders are fully informed prior to their vote, a buyer’s board might sometimes need to retain the ability to evaluate and pursue alternative proposals (at least unsolicited ones) that arise prior to the stockholder vote. Thus, if an acquisition will be conditioned on approval of the buyer’s stockholders and the merger agreement contains a “no shop” provision applicable to the buyer (or otherwise includes significant restrictions impacting the buyer’s ability to evaluate alternative proposals), the buyer’s board should carefully consider whether it is appropriate to include “fiduciary outs” to such deal protection provisions, as is often done with respect to deal protection measures applicable to a seller.

There might even exist rare situations in which a buyer’s board determines that it would be appropriate to negotiate for a fiduciary or “superior proposal” termination right. For example, where the buyer’s board has determined that consideration of potential alternatives would be advisable but time constraints or other circumstances have necessitated that the buyer enter into a particular acquisition agreement


21 In circumstances in which no vote of a buyer’s stockholders is required, an acquisition still might raise “ownership” issues with respect to those stockholders. For example, stockholder ownership issues could be implicated where an acquisition would radically transform the buyer’s business or increase its size in a way that is likely to deter, or possibly raise anti-trust concerns in connection with, potential future proposals to acquire the combined company.
before its board has had sufficient opportunity to fully explore other alternatives, the buyer’s board might have a fiduciary obligation to ensure that the agreement does not unreasonably constrain its ability to consider and potentially accept such other alternatives, even where that might require terminating the existing deal.

On the other hand, there undoubtedly will be circumstances in which no vote of the buyer’s stockholders is required and in which the buyer’s board can reasonably conclude that it is appropriate to enter into an acquisition agreement that effectively “locks up” the buyer’s obligation to close the deal with the seller. Indeed, the Court of Chancery observed in Stone Energy that such “lock ups” provide deal certainty for a seller and suggested that such provisions could be appropriate under many circumstances in which a vote of the buyer’s stockholder will not be required.22

Thus, Stone Energy suggests that there is no “one size fits all” rule that Delaware courts will apply in evaluating whether a buyer’s board has complied with its fiduciary obligations in entering into an acquisition agreement and in agreeing to deal protection measures in connection therewith. The important lesson from Stone Energy is that before entering into an acquisition agreement, a buyer’s board should carefully consider all the relevant circumstances and should make an informed, good faith business judgment not only as to whether the acquisition is in the best interests of the corporation and its stockholders, but also as to whether any related deal protection measures that may restrict or deter alternative transactions for the buyer are reasonable under the circumstances. Where an acquisition will require a vote of the buyer’s stockholders, the fiduciary analysis may be somewhat more nuanced and, at the very least, the buyer’s board will have an ongoing fiduciary obligation to continue to assess its recommendation to stockholders and to change or modify that recommendation if the circumstances require.

**Conclusion**

While it has long been understood that a buyer’s board of directors owes fiduciary obligations to the corporation and its stockholders when entering into an acquisition agreement, the case law has seldom specifically addressed the precise nature of those duties and their implications for the permissible scope of “deal protection” measures applicable to the buyer. Perhaps for that reason, such issues are sometimes glossed over by corporate directors and their counsel. The recent Stone Energy decision, however, serves as an important reminder that directors and their counsel should remain sensitive to the unique obligations of the buyer’s directors in connection with acquisitions. Although increased sensitivity to such issues is unlikely to lead to significant change in the drafting of merger agreements, increased focus by a buyer’s directors on their contextually-specific fiduciary obligations when entering into an acquisition agreement will better position them in the event that their decision is subsequently challenged in a Delaware court.

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22 See Stone Energy, 2006 WL 2947483, at *11 n.102 (“Where no parent stockholder vote was required, the provisions similar to 6.2(e) conceivably could be construed as a type of ‘lock-up’ guaranteeing deal certainty for the target and prohibiting the parent from engaging in any activity, strategic alternative or not, that would materially delay or impair the transaction.”).
 TASK FORCE REPORTS

Task Force on Acquisitions of Public Companies

The Task Force on Acquisitions of Public Companies held a well-attended meeting in Dallas, Texas, on October 21, 2006. At the meeting, we discussed the newly formed Editorial Board and encouraged all draftspersons to complete drafts as soon as possible. Henry Lesser then reviewed the best-price rule amendments, which led to a discussion of the impact of the amendments on deal structuring.

We then turned to the recommendation covenants. We discussed the evolution of practice and concluded that we would not limit the right to withdraw to a superior offer but instead would provide the right to withdraw to the extent required by fiduciary duties. We discussed the possibility of adding a parent right to withdraw a recommendation and Delaware counsel reviewed the recent decision in the Stone Energy case. Keith Flaum and Jim Melville agreed to revise the commentary, and to reflect the parent’s right to withdraw on equivalent terms. Byron Egan then reviewed the miscellaneous clause and the third party beneficiary language.

Our annual Task Force meeting in Wilmington, Delaware was also well-attended. On Saturday, February 3, 2007, we met in the morning with Chief Justice Steele, Justices Jacobs and Ridgely, and Vice Chancellors Lamb, Noble and Parsons. We devoted the morning to an interesting discussion of a hypothetical prepared by Mark Morton that provoked lively discussion – thanks again both to Mark for his hard work on the hypo and to the participants: Jim Walther, Rick Alexander, Mike O’Bryan, and Steve Bigler – they did a great job.

We spent the afternoon discussing the most recent draft of the Voting Agreement prepared by Bryan Davis. We also received updates on the status of the Confidentiality Agreement and the Representations and Warranties sections, as well as the work of the Editorial Board.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on Joint Ventures

As you all know, the ABA has published the Model Joint Venture Agreement, which has received very favorable reviews. Therefore, the primary work of the Task Force has been completed.

A small group of Task Force members has been assembled, under the leadership of Alison Youngman, to “internationalize” the Model Joint Venture Agreement. If you have any questions on this component of the Task Force work, please contact Alison directly.

Thomas B. Hyman, Jr.
Alison J. Youngman
Co-Chairs

Task Force on the Model Stock Purchase Agreement

The Editorial Committee of our Task Force is continuing its work on the text of the Revised Model Stock Purchase Agreement. The Editorial Committee conducts regular monthly conference calls to work on the document. Once the text has been finalized, the Editorial Committee will turn its attention to Commentary and will be coordinating its efforts with the Task Force on M&A Jurisprudence. At that juncture, additional drafting assignments should become available for Task Force members.

Robert T. Harper
Chair
International M&A Subcommittee

The International M&A Subcommittee met in Dallas, Texas, on October 20, 2006. The meeting began with remarks by the future Chairman of the Business Law Section, Charles E. McCallum, who informed us that the Business Law Section already has a significant international membership and that an increased international focus would be a principal emphasis of his chairmanship. He further praised the work of our Subcommittee and of the Committee in general.

The meeting continued with an informative discussion of current trends in M&A transactions in Germany by Robert Wethmar. A copy of the PowerPoint slides for Robert’s presentation (“Doing M&A Deals in Germany”) has been posted on the Subcommittee’s website.

The Subcommittee discussed possible future programs, either for general presentation at future ABA meetings or as the Committee Forum portion of future Committee meetings. John Leopold suggested that we develop programs based on the Subcommittee’s recent or imminent publications, including those relating to the international stock purchase agreement project and the international due diligence project. We also discussed ideas for programs relating to international LBO and MBO transactions and a program on international tax principles important to cross-border M&A transactions. Freek Jonkhart suggested that we consider a program on controlled auction sales of companies in the international context. Rick Silberstein and Phillip Risbjørn agreed to take the lead in developing the international LBO program. Peter Haver agreed to take the lead in organizing a program on international tax principles for M&A lawyers, with the goal of addressing broad concepts that international M&A lawyers should be familiar with, rather than being a program tailored for tax specialists.

Freek Jonkhart described the project he is leading for the M&A Market Trends Subcommittee, which involves a survey of international business combination agreements in an effort to develop a market trends summary and analysis similar to the very successful market trends projects that have been conducted for U.S. public and private transactions by the M&A Market Trends Subcommittee. He said it had been tentatively decided that the agreements to be surveyed would be those for transactions involving €20 million or more.

Subcommittee Co-Chair Stan Freedman led a discussion of the status and proposed work plan for preparation of the international version of the Model Asset Purchase Agreement, which is one of our Subcommittee’s current principal projects. After discussion of the assumed fact pattern on which the agreement will be based, it was agreed that it would be useful to re-circulate the draft statement of the fact pattern that had previously been prepared by Daniel Rosenberg and Stan, and tentatively agreed upon by the Subcommittee.

Stan described the plan to allocate work on the agreement to subgroups for drafting purposes. Each subgroup will be responsible for drafting a specific portion of the agreement, and considering the relevant legal and business points that are most commonly encountered in the respective portions of cross-border acquisition agreements. The drafting groups will then make presentations at Subcommittee meetings of their portion of the agreement, including a summary of key business and legal points, to form the basis for group discussion by the Subcommittee. The drafting groups will then take the results of Subcommittee discussion, revise their drafts as appropriate and develop commentary for further review by the Subcommittee.
Stan then asked for volunteers for the drafting groups. Jim Walther, Jay Lefton and Rick Silberstein volunteered for the first section of the agreement, setting forth the basic terms of the transaction. Frank Picciola volunteered to prepare the section dealing with arbitration and related provisions. Freek Jonkhart and Franziska Ruf volunteered to work on the financial statement representations section. Additional volunteers are needed for these sections and for the remainder of the model agreement. To facilitate the organization of drafting teams, an outline of the entire agreement, showing the proposed allocation of drafting teams, will be circulated to the Subcommittee in advance of our next meeting.

The meeting concluded with a general discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice and particular issues they have encountered. Among others:

Mireille Fontaine described stock option repricing developments in Canada;

Rick Silberstein summarized legislative developments in Spain of interest to M&A practitioners;

Henry Lesser summarized recent amendments to the U.S. Securities and Exchange Commission’s best-price rule (Rule 14d-10(a)(2)) intended to clarify that bona fide employment compensation payments will not be considered tender offer consideration that would require increasing the price paid to all tendering stockholders; and

Nick Dietrich reported on the Sears Holdings Corp./Sears Canada Inc. take-over contest involving, among other interesting points, an important issue under the “collateral benefits” rule (an analogue to the U.S. “best-price” rule for tender offers) in the Ontario Securities Act.

Brief summaries of these topics may be found on the Subcommittee’s website.

Our next meeting will be held Friday, March 16, from 2:00 p.m. until 4:00 p.m., in Washington, D.C. We expect to have conference telephone arrangements for those who will not be able to attend in person. Specific meeting information, including location and agenda, will be posted on the Subcommittee’s website prior to the meeting.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

As of March 7, 2007, the Committee had over 2,100 members representing 39 countries including the U.S. We have over 450 in-house counsel members and 635 associate (non-lawyer) members. We have significantly increased in size over the past four years. As is evident from these numbers, the Committee is one of the most popular committees within the ABA.

We have recently seen significant interest from various legal and non-legal professionals within the deal community who are interested in joining our Committee. These data points suggest that we can expect to see continued growth in membership.

Hendrik Jordaan
Chair
M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee has two working groups. The Annual Survey Working Group identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, which is published annually in The Business Lawyer. The Judicial Interpretations Working Group examines judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking not only for recent M&A cases of special interest, but also examining the entire body of case law on the specified type of provision. The Annual Survey Working Group will meet in Washington D.C. on Thursday, March 15, from 4:30 p.m. until 5:30 p.m., and the Judicial Interpretations Working Group will meet on Friday, March 16, from 11:30 a.m. until 1:00 p.m. Both meetings will be held in the Renaissance Washington, D.C. Hotel.

Annual Survey Working Group

The fifth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions will appear in the February 2007 issue of The Business Lawyer, which we are hoping will be published by May. Our working group is beginning to collect 2007 cases for consideration for inclusion in our 2007 annual survey. We are asking all members of the Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Scott Whittaker at swhittaker@stonepigman.com or to Jon Hirschoff at jhirschoff@fdh.com. You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 325-5001. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control. The second criterion is that the decision must (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

Decisions to be Discussed at the Washington D.C. Committee Meeting


On February 23, 2007, Chancellor Chandler of the Delaware Court of Chancery rendered an opinion addressing plaintiffs’ request for injunctive relief in connection with a proposed merger of Caremark RX, Inc. with CVS Corporation. The plaintiffs requested that the Chancellor preliminarily enjoin a meeting of stockholders of Caremark called to approve the merger. Based on his determination that a cash dividend payable at or after the effective time of the merger would be merger consideration, so that appraisal rights would be available to Caremark stockholders, the Chancellor enjoined any vote by Caremark stockholders until at least twenty days after proper disclosure of those appraisal rights.

Caremark is a leading provider of drug benefit services to health plans and their participants. CVS is America’s largest retail pharmacy chain. As an intermediary between pharmacy companies and health plans, Caremark confronted the risk of being cut out of the middle,
and had therefore sought strategic combinations to ensure its continued profit growth. In 2005, it had preliminary discussions with Express Scripts, Inc. regarding a possible merger. Express Scripts, like Caremark, provides pharmacy benefit services. Those negotiations were dropped after Express Scripts issued a disappointing earnings announcement. Around that time, Edwin Crawford, Chairman and CEO of Caremark, and Thomas Ryan, Chairman and CEO of CVS, began to discuss a vertical merger of their firms. The merger was envisioned as a no premium “merger of equals.”

In August 2006, Caremark management met with its board to review strategic opportunities. The board agreed with management’s assessment that a merger with a retail drugstore chain offered better strategic opportunities than one with another pharmacy benefits manager. Management identified CVS as a strong potential merger partner and the board instructed management to proceed.

On November 1, 2006, the boards of Caremark and CVS approved, and the companies entered into, a merger agreement, subject to approval by the stockholders of both companies. Under the agreement, Caremark stockholders would own approximately 45% of the combined company, and the board would be evenly split. Crawford would serve as Chairman and Ryan as CEO.

The defendants, including Crawford and the other directors of Caremark, insisted that while this “merger of equals” did not constitute a corporate change of control for purposes of Delaware jurisprudence under Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), it was a change of control for purposes of most of Caremark’s senior executive employment contracts and for purposes of acceleration of outstanding Caremark stock options. This led Chancellor Chandler, in note 6 of his opinion, to quote Lewis Carroll’s Humpty Dumpty:

The Caremark directors’ assertion of mastery has a very Through the Looking Glass feel to it. Certainly words may change in legal significance depending upon their context, and the Court realizes that the practical effect of invoking Revlon duties when directors receive “change of control” payments will be to inspire the drafters of executive employment contracts to simply rename this particular class of remuneration. It is an unfortunate and disappointing spectacle, however, to watch a board of directors insist that it simultaneously deserves the protection of the business judgment rule because the company is not changing hands, while a massive personal windfall is bestowed because it is. As Alice’s cantankerous egg puts it, “When I make a word do a lot of work like that . . . I always pay it extra.”

The Chancellor noted that Crawford stood to gain over $14 million from accelerated realization of options, and an additional “severance” payment between $36 million and $40 million (even though he would remain with the merged company as Chairman), “although he has generously agreed to accept a mere $26.4 million ‘as an indication of his commitment to the merger and his confidence in the long-term economic benefits to be derived’ therefrom.”

The proposed merger would provide substantial benefits to Caremark management and directors in another respect. Caremark and its directors are involved in civil litigation relating to alleged backdating of stock options. Chancellor Chandler noted that the merger would protect Caremark directors and executives from possible liability for options backdating in three ways: (i) the merger agreement provided that the merged company would honor any Caremark options, whether or not later found to have been granted in violation of the Caremark directors’ fiduciary duties; (ii) the merged company was committed to indemnify past and present directors of Caremark either to the extent provided in the Caremark
charter and by-laws or to the fullest extent permitted by law; and (iii) the merger may eliminate the standing of derivative plaintiffs in certain ongoing backdating lawsuits. As Chancellor Chandler observed in note 7 of his opinion, indemnification of former Caremark directors by the merged company would arguably arise under contract law and outside the limits of Delaware corporate law. “In effect,” he wrote, “CVS shareholders are offering to indemnify Caremark directors.”

The merger terms contained, in the Chancellor’s words, “a full complement of deal-protection devices.” These included reciprocal “force the vote” and “no shop” provisions, a “last look” provision obligating a target board to disclose the terms of a competing Superior Proposal and allowing the other party five days to match the bid, and a $675 million reciprocal termination fee. With respect to the termination fee (approximately 3% of deal value) and the other deal protection devices, Chancellor Chandler cautioned, in note 10:

Defendants maintain that these are no more than a customary set of devices employed regularly by market participants and their lawyers. Particularly with respect to the termination fee, this argument by custom fails to convince.

It is true . . . that this Court has upheld termination fees of greater than three percent of total deal value . . . .

. . . Though a “3% rule” for termination fees might be convenient for transaction planners, it is simply too blunt an instrument, too subject to abuse, for this Court to bless as a blanket rule.

Nor may plaintiffs rely upon some naturally-occurring rate or combination of deal protection measures . . . . [P]laintiffs must specifically demonstrate how a given set of deal protections operate in an unreasonable, preclusive, or coercive manner . . . to inequitably harm shareholders.

The Chancellor found it unnecessary to address the specific deal protection devices at this stage of the litigation because he found no irreparable harm – provided the stockholders have the opportunity to exercise a fully-informed vote.

On December 18, 2006, Express Scripts announced an unsolicited bid for Caremark at a 22% premium (the bid valued Caremark at approximately $26 billion or $3 billion more than its implicit value in the proposed CVS merger), conditioned on, inter alia, due diligence, antitrust approval and termination of the CVS merger agreement. Defendants argued, publicly and in the litigation, that Caremark’s board was determined to pursue a vertical merger as a matter of corporate strategy, that certain Caremark clients were reluctant to work with Express Scripts, that the entity resulting from the Express Scripts proposal would be highly leveraged, and that the Express Scripts offer was defensive, intended to disrupt the proposed merger with CVS. On January 7, 2007, the Caremark Board announced that, after consultation with its advisors, it had determined that the Express Scripts offer was not a “Superior Proposal” within the meaning of the merger agreement’s no-shop provision.

On January 13, 2007, CVS proposed two revisions to the Caremark/CVS transaction: (i) that Caremark stockholders receive a special $2 per share cash dividend, to be declared before the effective date of the merger, but payable only if the merger was approved by stockholders, and to be paid at or immediately after closing; and (ii) that the merged entity would repurchase 150 million shares of common stock after the merger. The Caremark board approved those revisions. On January 16, Express Scripts commenced an exchange offer on the same economic terms as its previously announced bid. The Caremark board reaffirmed its determination that the Express
Script proposal was not a “Superior Proposal.” Two days later, the board recommended to Caremark stockholders that they reject the exchange offer. An all-out proxy contest ensued. On February 12, Caremark supplied its stockholders with additional information in an 8-K filing. The next day, CVS agreed to an increase in the special dividend to $6 per share. In a February 13 decision, the Chancellor enjoined the Caremark stockholders’ meeting, originally scheduled for February 20, to allow more time for stockholders to consider the February 12 disclosures.

Chancellor Chandler’s February 23 opinion addressed plaintiffs’ claims that the individual defendants breached their fiduciary duties by (i) agreeing to the deal protection measures, (ii) failing to investigate other merger opportunities, and (iii) failing to disclose material information, and that CVS aided and abetted these violations. Defendants contended that the deal protection measures were standard market contract terms for a merger of equals between two strategically motivated companies.

CVS challenged Express Script’s standing on the basis that the Caremark stock owned by Express Script’s subsidiary, KEW Corp., was purchased more than one month after announcement of the merger, and that the stock was purchased with full knowledge of the merger terms. Acknowledging that Delaware law discourages stock purchases for the purpose of attacking past transactions, and that Express Scripts lacked standing to challenge any transaction occurring before December 13, 2006, the date on which KEW purchased its Caremark stock, the Chancellor wrote that “[i]t is plaintiffs, not Caremark’s directors, who have convincingly asserted an entitlement to appraisal.” Plaintiffs’ position was that the $6 cash special dividend was merger consideration, triggering appraisal rights under Section 262 of the Delaware General Corporation Law. Defendants contended that the special dividend, approved and payable by Caremark, had independent legal significance, and that therefore the stockholders were not entitled to appraisal rights in connection with the proposed stock-for-stock merger. The Chancellor disagreed, pointing out that the joint proxy statement stated that the special dividend was only payable upon or after, and was conditioned upon the occurrence of, the effective time of the merger. The Court concluded that those facts “believe the claim that the special dividend has legal significance independent of the merger” and, therefore, “the label ‘special dividend’ is simply cash consideration dressed up in a none-too-convincing disguise.”

In considering plaintiffs’ requests for injunctive relief, Chancellor Chandler thought that the availability of appraisal rights to the Caremark stockholders was of critical importance. He noted: “This decision is not without some irony: it is plaintiffs, not Caremark’s directors, who have convincingly asserted an entitlement to appraisal.” Plaintiffs’ position was that the $6 cash special dividend was merger consideration, triggering appraisal rights under Section 262 of the Delaware General Corporation Law. Defendants contended that the special dividend, approved and payable by Caremark, had independent legal significance, and that therefore the stockholders were not entitled to appraisal rights in connection with the proposed stock-for-stock merger. The Chancellor disagreed, pointing out that the joint proxy statement stated that the special dividend was only payable upon or after, and was conditioned upon the occurrence of, the effective time of the merger. The Court concluded that those facts “believe the claim that the special dividend has legal significance independent of the merger” and, therefore, “the label ‘special dividend’ is simply cash consideration dressed up in a none-too-convincing disguise.”

Chancellor Chandler considered, in addition to the absence of appraisal rights disclosure, eight claims regarding the defendants’ disclosure. He concluded that one of the eight warranted injunctive relief. That claim pertained to the disclosure of the fee arrangements for Caremark’s bankers. Caremark’s agreements with UBS and JP Morgan both required an opinion as to the advisability of the CVS merger. Each opinion, regardless of its conclusion, triggered the payment of $1.5 million to the advisor giving the opinion. Upon the consummation of the transaction with CVS or an alternative transaction within a specified time period, an additional $17.5 million became payable to each advisor. The defendants’ disclosure stated that the bankers would receive the same fee in connection with an alternative transaction as in a transaction with CVS. The
Chancellor found this disclosure technically true but misleading by omission, because it failed to disclose that without an initial favorable recommendation, there would have been no announcement of a transaction with CVS and therefore no trigger of the $17.5 million fees.

The Chancellor enjoined any vote of Caremark stockholders with respect to the CVS merger for at least twenty days after defendants properly disclose appraisal rights and the structure of fees paid to Caremark’s bankers. He concluded that at this stage no broader injunction was necessary. “The balance of the equities weighs in favor of permitting informed shareholders to speak directly to their fiduciaries without further intervention by this Court.”

With respect to the seven claims of inadequate disclosure that the Chancellor found did not require injunctive relief, he stressed the extraordinary nature of injunctive relief, the Court’s deference to the rights of adequately informed stockholders to make their own decisions, and the availability of appraisal rights. Although he found that defendants’ disclosure regarding the $6 special dividend did not warrant judicial intervention, his discussion of that disclosure is worth some attention. Plaintiffs contended that there was inadequate disclosure regarding the negotiation of the initial $2 dividend, and none at all regarding the $4 increase.

Plaintiffs contend that Caremark’s board, having failed to vigorously negotiate the best dividend for the stockholders, also failed to disclose their failure.

Although this information heightens my suspicions regarding the integrity of the process underlying these merger negotiations, it does not significantly alter the total mix of information available to the shareholders . . . . [T]he board disclosed in the supplement that management, most of whom stand to receive large change of control fees, negotiated the special dividend. Little more may be gained by disclosing [who] served as the negotiator.

Second, defendants have already disclosed the somewhat troubling aspects of the negotiation process (or lack thereof) . . . . Based on these disclosures, a shareholder may readily infer the degree of vigor and energy with which the Caremark board negotiated for the conditional dividends. The current disclosures already suggest a certain indifference . . . and supine acceptance of any additional consideration that might descend like manna from heaven from CVS. Defendants are under no duty to engage in further self-flagellation.

Finally, the Chancellor observed in note 28 that Caremark accepted the $4 increase in the special dividend after it had already determined that the deal was fair from a financial point of view. “Without being overly cynical, I doubt shareholders will be misled as to whom to thank for the special dividend.”


In this decision, the N.Y. Appellate Division, First Department, upheld the decision of the lower court (N.Y. Sup. Ct. Index No. 600610/03), which dismissed certain indemnification claims of a buyer under a stock purchase agreement. The target company was Hartz Mountain Corporation, which, through its subsidiaries, manufactures pet products, including flea capsules and topical flea killers. After the closing of the transaction, flea capsule sales declined, primarily because the topical flea killers proved more popular. As a result, customers of the target company who had purchased quantities of the flea capsules prior to the closing returned them after the closing and were given credits for
the returns. The buyer made a claim under the indemnification provisions of the stock purchase agreement, seeking $35.2 million, which was calculated by multiplying the earnings of the target from flea capsules for the year prior to the closing by the 6.5 multiple of earnings that the buyer alleged was the basis of the purchase price (although that multiple was not embodied in the stock purchase agreement).

The indemnification clause under which the buyer claimed the seller was liable read as follows:

Seller, and Hartz Group shall indemnify and hold harmless Buyer, the Acquired Companies, and their respective directors, officers, employees or other representatives, stockholders, controlling persons, and affiliates (collectively, the “Indemnified Persons”) for, and shall pay the amount of, any loss, liability, claim, damage, expense (including, without limitation, settlement costs and any reasonable legal, accounting or other expenses for investigating or defending any actions or threatened actions), or diminution of value, whether or not involving a third-party claim (collectively, “Damages”), arising, directly or indirectly, from or in connection with:

(c) any product shipped or manufactured by, or any services provided by, any Acquired Company prior to the Closing Date, other than Immaterial Consumer Claims;

The lower court, in dismissing buyer’s indemnification claim, placed great importance on the fact that the indemnification provision was taken from the ABA Model Stock Purchase Agreement With Commentary, authored by our Committee. The Court stated that “[e]specially significant is that nothing in the form book’s Commentary supports a reading that the language in Section 9.2(c) was intended to operate as a stand-alone provision, functioning as a product sales guaranty.” After quoting extensively from the Commentary in the ABA Model Stock Purchase Agreement, the lower court concluded that:

These comments by the persons who drafted the products clause underscore that the stock language does not express an “unmistakable intent” that the products clause operates as a stand-alone clause, obligating Sellers to indemnify Buyers against “losses” or “diminution of value” resulting merely from declining sales of one of Pet Company’s products, not resulting from any defect in the product. If, as Sellers contend, that was the “intent” of the clause, the very editors who drafted it, who described it as providing a remedy for an underlying breach, were “mistaken.”

Based on this analysis, and the fact that nowhere else in the stock purchase agreement was the customer returns issue addressed, the Court concluded that the buyer was not entitled to indemnification.

This case is a reminder that buyers should be careful to add specific representations, warranties or indemnification provisions with respect to matters that are of concern in a transaction, rather than relying on general provisions. It is also interesting in its reliance on the Model Stock Purchase Agreement Commentary in determining the intent of the parties, who used the Model Stock Purchase Agreement in this transaction.

Judicial Interpretations Working Group

The Judicial Interpretations Working Group met during the Committee’s October 2006 stand-alone meeting in Dallas, Texas. Attendees at that meeting discussed the status of the work of the teams that have been formed to research and prepare memoranda pertaining to the
jurisprudence interpreting more than 20 different provisions of M&A agreements and ancillary documents. At our Washington D.C. meeting, we will devote much of our meeting to the discussion of the Memorandum prepared by Donald Dalik pertaining to Judicial Interpretations of Full Disclosure (“10b-5”) representations.

The next meeting of the Judicial Interpretations Working Group will be in Washington, D.C. on Friday, March 16, from 11:30 a.m. until 1:30 p.m., in the Renaissance Washington, D.C. Hotel. We have a number of new projects that we would like to start and invite new members to join us. To join, please email Jim Melville at jcm@kskpa.com with a copy to Scott Whittaker at swhittaker@stonepigman.com or simply come to our working group meeting in Washington, D.C.

Scott T. Whittaker  
Subcommittee Chair
Jon T. Hirschoff  
Chair - Annual Survey Working Group
James C. Melville  
Chair - Judicial Interpretations Working Group

**M&A Market Trends Subcommittee**

The M&A Market Trends Subcommittee is in the process of producing not one, not two, not three, not four, but five deal points studies.

Wilson Chu and Larry Glasgow are chairing the 2007 edition of the Private Target Deal Points Study (benchmarking deals closed in 2006). It is scheduled for release in August. This time around, we have “Issue Team Leaders” who will be coordinating analysis and quality control for designated issue groups. As the duties of the “Issue Team Leaders” will undoubtedly involve more work than bargained for, we would like to take this opportunity to recognize them:

- Deal Information: Mark Danzi;
- Financial Provisions: Dennis Barsky;
- Pervasive Qualifiers: Stuart Johnson;
- Representations and Warranties: John Corrigan;
- Covenants: Brian Lenihan;
- Reliance and Sandbagging: Hendrik Jordaan;
- Closing Conditions: Carl Sanchez;
- Indemnification: Steve Tonsfelt & David Fisher;
- Termination: Michael Hollingsworth; and
- Dispute Resolution: Michael Kennedy.

Keith Flaum is chairing the first-ever Private Equity Deal Points Study which will analyze and benchmark key negotiation issues in PE-sponsored buyouts of public companies (benchmarking deals announced in 2005 and 2006). The Private Equity M&A Subcommittee is collaborating with our Subcommittee on this Study – we really appreciate its assistance!

Keith is also chairing the 2007 edition of the Strategic Buyer/Public Target Study (also benchmarking deals announced in 2005 and 2006). Those public target studies are also scheduled for release in August.

Freek Jonkhart is chairing our first-ever European Deal Points Study. Reid Feldman is vice-chair. Unlike in the U.S. where acquisition agreements are publicly available, the agreements to be analyzed will be contributed by various firms in Europe. Freek and Reid are still taking volunteers. Anyone interested should feel free to contact them.

Consistent with the Committee’s continuing quest for M&A Total World Domination, we are also moving into Canada with
John Clifford chairing a Canadian version of our Deal Points Study. Vice chairs for this project are Kevin Kyte and Mireille Fontaine. Please contact John if you are interested in working on his project.

Wilson Chu
Larry Glasgow
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Dallas, Texas, on October 21, 2006. The meeting was well-attended in person and by telephone. We reviewed a number of pending projects involving collaboration with other subcommittees and working groups. The bulk of the meeting was devoted to a discussion of the recently reported Justice Department informal investigation into certain “clubbing” practices. Perspectives were expressed on the implications of this development both from U.S. practitioners and from several of our non-U.S. members

Henry Lesser
Chair

Programs Subcommittee

At the Spring Meeting in Washington, D.C., our Committee will be sponsoring a Committee Forum entitled Foreign Investment in the US: The CFIUS Process. The Committee Forum will be held Saturday, March 17, from 3:00 p.m. until 4:00 p.m., immediately following the full Committee meeting. The Committee Forum, chaired by Jim Melville, features a panel consisting of The Honorable Clay Lowery, Assistant Secretary for International Affairs, U.S. Treasury Department and Farhad Jalinous of Kaye Scholer LLP, Washington, D.C. These experts in CFIUS, Exon-Florio and other defense matters will discuss how to recognize and manage national security implications in M&A transactions, a subject that has received considerable public and political attention due to national security issues.

The Committee will also be sponsoring the following two programs:

Risk-Sharing, Partnering . . . . and the Troubled Waters of the Joint Venture, is scheduled for Saturday, March 17, from 8:00 a.m. until 10:00 a.m. Alison Youngman and Tom Hyman chair this program, which draws upon the Committee’s newly-published Model Joint Venture Agreement. The panel, which includes George W. Patrick, Thomas W. Van Dyke and Willard K. Tom, will discuss how to avoid risks and how to structure the agreement, including the framework for governance, liquidity and other issues to assist the seasoned practitioner in drafting these agreements.

International Private Equity: Leveraged Buy-Outs of European Companies, is scheduled for Thursday, March 15, from 2:30 p.m. until 4:30 p.m. A panel of experienced European and U.S. M&A lawyers chaired by James Walther and Dan Rosenberg will discuss key issues and market trends encountered in structuring and negotiating leveraged buy-outs of European companies. The panel features Moderators Richard A. Silberstein and Philip Risbjorn and panelists Eileen Nugent and Christian Cascante.

In addition, our Committee is co-sponsoring the following program:

Environmental Issues Don’t Have to Tank a Deal: Managing Environmental Risk and Closing Deals, scheduled for Friday, March 16, from 2:30 p.m. until 4:30 p.m. The lead sponsor of this program is the Committee on Environmental, Energy and National Resources Law, but the program will be relevant to M&A practitioners. Stephen J. Humes (Chair), Robert Ouellette and John P. Lowe, Jr. from our Committee will participate on this panel for this program.

Thomas M. Thompson
Chair
Technology Subcommittee

Our Committee website has become a center for recent development materials on the topic of M&A law. Papers from our various forums have been posted, along with the popular “Deal Points” studies. We continue to solicit content for our website from Committee members. Submissions should be forwarded to the Technology Subcommittee Chair.

The Task Force on Revisions to the Model Stock Purchase Agreement has become the first group to make use of the Committee’s extranet. That Task Force has posted the working draft of its document to the website, together with member comments, timelines and various committee resources. The extranet is available for use by any of our other subcommittees, task forces or working groups as a central means for filing and organizing materials and as a means of communicating with members.

Our fall stand-alone meeting in Dallas, Texas provided the occasion for a new Committee first. We were able to provide dial-up service so that absent Committee members could listen in to the plenary Committee meeting, including the CLE presentations that were part of that meeting. Written materials distributed during the meeting were available for downloading at the Committee website. Technology (and our loyal ABA staff) served us well, and we received many favorable comments on the availability of the service. We hope to duplicate this at our Fall 2007 stand-alone meeting.

If you have not visited the Committee’s website recently, the address is as follows: http://www.abanet.org/dch/committee.cfm?com=CL560000. Use your ABA membership number or email address as your username and your last name as your password.

George M. Taylor, III
Chair

COMMITTEE MEETING MATERIALS

COMMITTEE ON NEGOTIATED ACQUISITIONS
2007 SPRING MEETING
WASHINGTON D.C.
MARCH 15-17, 2007

SCHEDULE OF MEETINGS AND OTHER ACTIVITIES

Thursday, March 15

Institute for the Young Business Lawyer: Nuts and Bolts of Mergers and Acquisitions
10:00 a.m. - 11:30 a.m.
Renaissance Hotel
Congressional B, Ballroom Level

Program – International Private Equity: Leveraged Buy-Outs of European Companies
2:30 p.m. - 4:30 p.m.
Renaissance Hotel
Ballroom East, Ballroom Level

Annual Survey Working Group of the M&A Jurisprudence Subcommittee
4:30 p.m. - 5:30 p.m.
Renaissance Hotel
Meeting Room 9, Meeting Room Level

Friday, March 16

Editorial Committee on the Model Stock Purchase Agreement (Session 1)
7:30 a.m. - 10:00 a.m.
Renaissance Hotel
Meeting Room 12, Meeting Room Level
Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee
11:30 a.m. - 1:00 p.m.
Renaissance Hotel
Meeting Room 3, Meeting Room Level

Membership Subcommittee
12:00 p.m. - 1:00 p.m.
Renaissance Hotel
Meeting Room 9, Meeting Room Level

Task Force on Acquisitions of Public Companies
12:00 p.m. - 2:30 p.m.
Renaissance Hotel
Meeting Room 4, Meeting Room Level

Task Force on the Dictionary of M&A Terms
1:00 p.m. - 3:00 p.m.
Renaissance Hotel
Meeting 14, Meeting Room Level

International M&A Subcommittee
2:00 p.m. - 4:00 p.m.
Renaissance Hotel
Meeting Room 3, Meeting Room Level

Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs
4:00 p.m. - 5:30 p.m.
Renaissance Hotel
Meeting Room 16, Meeting Room Level

Saturday, March 17

Editorial Committee on the Model Stock Purchase Agreement (Session 2)
8:00 a.m. - 10:30 a.m.
Renaissance Hotel
Meeting Room 3, Meeting Room Level

Program – Risk-Sharing, Partnering . . . . and the Troubled Waters of the Joint Venture
8:00 a.m. - 10:00 a.m.
Renaissance Hotel
Auditorium, Meeting Room Level

Task Force on Acquisitions of Public Companies (Editorial Board)
9:00 a.m. - 11:00 a.m.
Renaissance Hotel
Meeting Room 2, Meeting Room Level

Private Equity M&A Subcommittee
10:30 a.m. - 12:30 p.m.
Renaissance Hotel
Meeting Room 3, Meeting Room Level

M&A Market Trends Subcommittee
11:00 a.m. - 12:30 p.m.
Renaissance Hotel
Meeting Room 13, Meeting Room Level

Full Committee Meeting
12:30 p.m. - 3:00 p.m.
Renaissance Hotel
Ballroom North and Central, Ballroom Level

Committee Forum: Foreign Investment in the U.S.: The CFIUS Process
3:00 p.m. - 4:00 p.m.
Renaissance Hotel
Ballroom North and Central, Ballroom Level

Committee Reception and Dinner
Reception at 7:00 p.m. and dinner at 8:00 p.m.
Army and Navy Club, 901 17th Street, N.W. (on Farragut Square)