FROM THE CHAIR  Scott T. Whittaker

I look forward to seeing many of you in Austin at the next meeting of the M&A Committee, which will be held at the Fairmont Austin Hotel on September 14-15, as part of the ABA Business Section Annual Meeting. Our subcommittees and task forces will meet throughout the day on Friday and Saturday, concluding with our full Committee meeting Saturday afternoon. A complete schedule is set forth at the end of this issue of Deal Points. Some of the highlights of our subcommittee and task force meetings are also described in the subcommittee and task force reports below. If you are unable to attend in person, please consider participating by teleconference. You can find the dial-in information for each task force, subcommittee, and the full Committee meeting at the end of this issue of Deal Points.

A special note of thanks to our sponsors for this weekend: Duff & Phelps and JP Morgan Chase. On behalf of the Committee, THANK YOU!

COMMITTEE LEADERSHIP CHANGES

My term as Chair concludes after our full committee meeting on Saturday afternoon in Austin, when Wilson Chu will begin his three-year term as Chair. Wilson has been a member of the M&A Committee for decades, and during that time has held several leadership positions, including his current position as Vice-chair, and formerly Membership Committee Chair and Founding Chair of the Market Trends Committee, where he was responsible for the creation of the Deal Points Studies, which have become one of the hallmarks of the M&A Committee. The M&A Committee will undoubtedly continue to thrive under Wilson’s leadership.

It has been a distinct honor and privilege to serve as Chair of the M&A Committee, which I am proud to say is the largest committee of the ABA, with over 5,000 members from 49 American states, five Canadian provinces and over 40 different countries on five continents. And not only are we the largest, but we are also the most prolific committee. In the last three years, our committee has published the Legal Project Management in M&A Transactions Guidebook (now in its second printing), and completed the soon to be published Handbook on Governance Issues Arising in Business Combination Transactions. In addition, two new Deal Points Studies were created (the Carveout Study and the Buyer Power Ratio Study), which raise to six the total number of periodic Deal Points Studies published by our Committee. We have continued to publish our Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, and have added to our on-line M&A Lawyers’ Library. We have created one new Subcommittee (M&A Technology) and two new Task Forces (Women in M&A and Short Form Acquisition Agreements). In addition, we have four publications in various stages of development (The Model Two Step Tender Offer Documents, the Revised Model Asset Purchase Agreement, the Private Company Model Merger Agreement, and the Model Short Form Acquisition Agreements). We also launched our Women in M&A Scholarship Program, our new member Ambassador Program, continued our annual National M&A Institute, and presented dozens of programs and webinars on a multitude of M&A topics. The list could go on and on.

It has been awe inspiring to witness so many top-shelf lawyers and M&A professionals devote countless, non-billable hours, to the work of our Committee. Although there is certainly a financial benefit to Committee involvement, such as through building a resume and referral network, those indirect, uncertain benefits are not alone sufficient to motivate people to work with the dedication that I have seen over my years of M&A Committee membership. Rather, the motivation that produces results for our Committee comes from enjoying the work, enjoying the people you are working with, and from the personal satisfaction of participating in a job well done. I look back on my term as Chair with that feeling of satisfaction, and I look forward to many more years of continuing involvement with the M&A Committee.

I conclude by thanking the other Vice-chairs who have served the Committee during my tenure: John Hughes, Jen Muller and Jim Griffin. John did nothing short of a superb job of
obtaining sponsors for our M&A Committee dinners. Without our sponsors, and John’s hard work in securing and coordinating them, the cost of the Committee dinners we have shared would have been significantly higher. Jen Muller founded our Women in M&A Task Force and has done an excellent job of leading all of our women in M&A initiatives. I sincerely believe that our committee, under Jen’s leadership, will make a real difference by increasing the number of women who choose a career in M&A. Jim handled the important job of coordinating the participation of the Delaware judiciary in our M&A Committee meetings. The opportunity to hear from and interact with members of the Delaware judiciary has long been one of the special benefits offered by the M&A Committee to its members, and Jim has kept that tradition alive. I could not have asked for a better team, and I am sincerely thankful for the contributions of John, Jen and Jim over these last three years.

**STAND-ALONE MEETING IN LAGUNA BEACH**

After Austin, our next meeting will be our stand-alone meeting, which will be January 25-26 in Laguna Beach. Please save the date and plan to attend if you can.

If you have any questions concerning our meeting in Austin, please do not hesitate to ask. I look forward to seeing many of you in Austin!

---

**FROM THE EDITORS**  Ryan D. Thomas & Chauncey M. Lane

In this issue of *Deal Points*, our feature articles are rich with insight from practitioners around the World. From working capital adjustments to the implications of UK Government’s Proposal for reviewing M&A on national security grounds to Reps and Warranties Insurance trends in Europe and Latin America; our committee members continue to keep us apprised of the trends and potential policies affecting our practices – both domestically and abroad. As part of a new initiative by our Technology in M&A Subcommittee, we also have our first in a series of actual law firm case studies demonstrating the use of technology and innovation in the legal practice; with the first focusing on artificial intelligence through document automation. A reoccurring topic and trend which many of us have yet to explore personally. We hope these case studies are helpful. Many thanks to each of our contributors, especially our feature article authors. As always, please let us know if would like to submit an article for a future issue. We look forward to seeing everyone in Austin!
# What's New & Trending

<table>
<thead>
<tr>
<th>Feature Articles</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working Capital Adjustments: Mitigation of Post-Closing Disputes Through Customization</td>
<td>6</td>
</tr>
<tr>
<td>UK Government Proposals for Reviewing Mergers and Other Investments on National Security Grounds</td>
<td>8</td>
</tr>
<tr>
<td>Warranty and Indemnity Insurance in Europe: Recent Trends</td>
<td>10</td>
</tr>
<tr>
<td>Case Study – Working with Document Automation Technology</td>
<td>12</td>
</tr>
</tbody>
</table>

# Task Force Reports

<table>
<thead>
<tr>
<th>Task Force Reports</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint Task Force on Governance Issues Arising In Business Combination Transactions</td>
<td>16</td>
</tr>
<tr>
<td>Task Force on Legal Project Management</td>
<td>16</td>
</tr>
<tr>
<td>Task Force on Financial Advisor Disclosure</td>
<td>16</td>
</tr>
<tr>
<td>Joint Task Force on M&amp;A Litigation</td>
<td>17</td>
</tr>
<tr>
<td>Task Force on Private Company Model Merger Agreement</td>
<td>17</td>
</tr>
<tr>
<td>Task Force on Revised Model Asset Purchase Agreement</td>
<td>17</td>
</tr>
<tr>
<td>Task Force on Women in M&amp;A</td>
<td>17</td>
</tr>
<tr>
<td>Joint Task Force on Short Form Model Acquisition Agreements</td>
<td>18</td>
</tr>
</tbody>
</table>

# Subcommittee Reports

<table>
<thead>
<tr>
<th>Subcommittee Reports</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>International M&amp;A Subcommittee</td>
<td>18</td>
</tr>
<tr>
<td>Membership Subcommittee</td>
<td>19</td>
</tr>
<tr>
<td>M&amp;A Jurisprudence Subcommittee</td>
<td>19</td>
</tr>
<tr>
<td>Acquisitions of Public Companies Subcommittee</td>
<td>21</td>
</tr>
<tr>
<td>M&amp;A Market Trends Subcommittee</td>
<td>22</td>
</tr>
<tr>
<td>Private Equity M&amp;A Joint Subcommittee</td>
<td>22</td>
</tr>
<tr>
<td>Technology in M&amp;A Subcommittee</td>
<td>23</td>
</tr>
</tbody>
</table>

# Deal People

<table>
<thead>
<tr>
<th>Deal People</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>24</td>
</tr>
</tbody>
</table>

# Committee Meeting Materials

<table>
<thead>
<tr>
<th>Committee Meeting Materials</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>26</td>
</tr>
</tbody>
</table>
MATERIALITY SCRAPE PROVISIONS IN 2017 TRANSACTIONS WITH INDEMNIFICATION BASKETS/DEDUCTIBLES

Using Kira, we reviewed materiality scrape provisions in transactions that include indemnification baskets and/or deductibles in M&A agreements publicly filed in 2017.

We identified a set of 107 M&A agreements from EDGAR using similar parameters to the ABA’s 2017 Private Target Mergers and Acquisitions Deal Points Study: deal values between $30M and $500M, filed between January 1 and December 31, 2017, involving private targets being acquired by public companies. Transactions in which the target was in bankruptcy, reverse mergers and divisional sales were excluded.

A review of the results in our sample set indicated that of 72 agreements including indemnification baskets and/or deductibles, 81% also included materiality scrapes that deleted all materiality qualifications from the representations and warranties in the transaction agreement for any indemnification purpose (i.e., determining whether a breach or inaccuracy of such representations or warranties occurred, calculation of damages/losses, or both). Of those agreements, 45% contained materiality scrapes that were limited solely to the calculation of damages/losses.

GOT NEWS & TRENDS?

Ryan D. Thomas — Co-editor
Bass, Berry & Sims PLC, rthomas@bassberry.com
Chauncey M. Lane — Co-editor
Husch Blackwell LLP, chauncey.lane@huschblackwell.com

Are you following any new deal trends or have other news relevant to our committee? If so, we want to share your content. Simply contact us via email (dealpoints@bassberry.com).
Kevin Kyte – Vice-chair of M&A Market Trends Subcommittee  
Stikeman Elliott, kkyte@stikeman.com

Sent out first draft, feeling my oats  
Agreement favors buyer most  
But the redraft I hate  
Comes back all straight  
Disrespecting my curly quotes

“Kevin Kyte”

Deal Points is introducing the first of what we hope to be many limericks about the practice of M&A. A limerick is a humorous verse, generally five lines long. Lines 1, 2 and 5 are longer (7 – 10 syllables) than lines 3 and 4, and rhyme with each other. Lines 3 and 4 have 5 – 7 syllables and rhyme with each another: aabba. The theme in order to be published must be related to M&A, the practice of corporate law or our committee. If there is an interest, send your submissions to Deal Points before the Laguna meeting. We may limit the number we publish to three an issue, so first come, first serve. Here is the first of what we hope to be many entries, penned by a brave soul in Canada.
Working Capital Adjustments: Mitigation of Post-Closing Disputes through Customization

By P. Gregory Hidalgo and A. Vincent Biemans

Private target M&A agreements often provide for one or more post-closing purchase price adjustment mechanisms, which may have a material effect on the value of the transaction to a buyer and seller. Indeed, 86% of the sampled transactions used in the ABA’s own Private Target Deal Points Study (transactions from: 2016 and H1 2017) incorporate post-closing purchase price adjustments. The most common purchase price adjustment mechanism is to adjust the purchase price for the target company’s working capital at closing, which we address in this article.

Stepping back to establish a basis for more in depth discussion, a company’s working capital consists of its current assets, such as accounts receivable and inventory, minus its current liabilities, such as accounts payable. The composition and the amount of working capital is subject to near-continuous change during the course of a company’s operating cycle and its measurement generally involves many accounting methodology determinations, estimations, and judgments.

In a nutshell, working capital adjustment mechanisms in an M&A transaction work as follows. After the transaction closes, the parties painstakingly determine the amount of working capital, however defined by the parties, that was transferred with the business at the closing. That final working capital amount is then compared to the target working capital agreed to be delivered by the seller to the buyer with the target company. The contractual amount of target working capital is customarily based on the target company’s (normalized) historical working capital needs or reflective of anticipated future needs, but is ultimately a negotiated amount and can be determined however the parties mutually agree for the transaction at hand. Ultimately, the purchase price is adjusted upward or downward to reflect the surplus or shortage of actual working capital at closing relative to the target working capital, and a corresponding true-up payment is made between the parties (net of any preliminary working capital adjustments made at closing).

**Defining Working Capital; Establishing the Target Working Capital**

Not surprisingly, working capital provisions are often heavily negotiated, beginning with the contractual definition of working capital, closely followed by the determination of the amount of target working capital. Possibly the most significant negotiation point between a buyer and seller is the methodology that is to be used by the parties to measure the amount of working capital at the closing. The parties commonly agree to rely on (i) generally accepted accounting principles (“GAAP”), (ii) the target company’s historical accounting practices, or (iii) a combination thereof.

When negotiating the measurement of working capital, sellers favor the target company’s historical accounting practices, and buyers prefer to prioritize GAAP. The parties’ respective preferences correspond with their disparate desires to avoid unfavorable post-closing surprises. A seller wants to ensure that the comparison between target working capital and closing working capital is made on an “apples-to-apples” basis in reliance on the target company’s historical accounting practices. A buyer, on the other hand, wants to be able to rely on GAAP to safeguard against non-GAAP errors in the target company’s historical accounting practices, which could otherwise result in overstated working capital. Compare:

- **Example of Seller Preferred Language**: “Closing working capital shall be determined in accordance with the target company’s historical accounting practices, including any exclusions or deviations from GAAP incorporated therein, ....”

- **Example of Buyer Preferred Language**: “Closing working capital shall be determined in accordance with GAAP applied on a basis consistent with the target company’s historical accounting practices. If there is a conflict between GAAP and the target company’s historical accounting practices, GAAP shall prevail,...”

In the remainder of this article, we discuss a more customized mechanism for selected working capital accounts in order to minimize undesirable adjustment surprises and post-closing disputes. We specifically highlight revenue recognition issues and the allowance for doubtful accounts, which are commonly disputed and may be ripe for customized solutions. For both items, we provide more seller-friendly and more buyer-friendly approaches, each of which potentially adds to comparability and mitigates uncertainty that can be associated with ambiguous documentation of accounting practices and the existence of multiple GAAP compliant accounting outcomes. Notably, these discussed approaches, in some circumstances, may be analogously customized to apply to other potentially problematic elements of working capital. Of course, in discussing a more customized mechanism for selected working capital accounts, we assume that the parties are willing—and the deal circumstances reasonably permit the opportunity—to consider and negotiate the working capital adjustment mechanism on a more granular, tailored basis.

**Repeated Errors – Revenue Recognition**

Although revenue is reflected on a company’s income statement, the application of accrual accounting and the associated matching of sales to the appropriate accounting period is realized by using balance sheet accounts. For example, a cash receipt for services that have not yet been performed can be booked as a deferred revenue liability on the balance sheet until the service is performed. The balance sheet then also appropriately reflects the company’s obligation to perform the service.

As a result, perhaps counterintuitively, flaws in revenue recognition accounting (i.e., errors in determining what revenue

---

1 The views expressed herein are the authors’ own and are not attributable to their firms, those firms’ members/partners, or their clients.

2 We utilize sample agreement language to highlight some of the issues. Such agreement language is, of course, necessarily abbreviated, incomplete, lacking in defined terms, and for illustrative purposes only.
should be included on the current period income statement as opposed to being deferred to a later period) can result in balance sheet errors. These errors, in turn, may impact the amount of working capital at the closing. In practice, a company may have relied on its original revenue recognition approach through years of growth, overhauls of its products and services mix, and other changes in facts and circumstances such as technical developments. Combined with complex and changing GAAP guidance, revenue recognition mistakes can result, and the impact of correcting revenue recognition errors may be significant.

A seller’s and buyer’s respective views of revenue recognition flaws, of course, diverge. A buyer desires to avoid owing post-closing performance obligations that it perceives as uncompensated due to past errors in revenue recognition. Accordingly, buyers generally prefer contractually mandated GAAP compliance for purposes of revenue recognition accounting when determining closing working capital. A seller, however, perceives a significant risk of a distinction without a difference that drives a wedge between the target working capital and the closing working capital in the event of GAAP-driven adjustments, i.e. from a seller’s perspective, two wrongs can make a right. Although that seller’s perspective may be directionally true in certain instances, the net effect is uncertain at best and absent specific circumstances two wrongs are unlikely to cancel each other.

A possible customized solution would be to provide for true parallel adjustments between the target working capital and closing working capital if revenue recognition errors are discovered. For example, a business that sells annual service contracts may have recognized quarterly revenue in violation of GAAP by accruing revenue for each contract entered into during a quarter from the start of that quarter, effectively recognizing revenue early across its service contracts. As a result of this error, the target company may understate the deferred revenue as of the closing date. Utilizing a parallel adjustment methodology after the transaction closes, the deferred revenue liability included in closing working capital and also included in the target working capital would be recalculated by prorating revenues from service contracts in accordance with GAAP. This approach would prevent both the “apples-to-oranges” comparison dreaded by sellers and also the existence of an understated deferred revenue obligation in violation of GAAP, to a buyer’s dismay. Importantly, the parallel adjustment could still result in a purchase price adjustment as a result of changes in the ordinary course of business.

Customized contractual language to implement an agreed upon parallel adjustment approach for revenue recognition can vary, either being more seller or buyer friendly:

- Example – Seller Friendly:
  ‘If the target company’s revenue recognition accounting principles are not in accordance with GAAP, those accounting principles shall be modified to comply with GAAP for purposes of calculating both the closing working capital and also the target working capital in a manner that results in the smallest absolute difference between the outcomes of two calculations: (i) the so adjusted closing working capital minus the so adjusted target working capital and (ii) the unadjusted closing working capital minus the unadjusted target working capital.’

- Example – Buyer Friendly:
  ‘If the application of the company’s revenue recognition accounting principles as of the closing date would result in the recognition of revenue prior to the closing for which not all of the GAAP recognition criteria were met at that time, the buyer may adjust those accounting principles to be in compliance with GAAP and may determine the closing working capital using the adjusted accounting principles; provided, however, that if the buyer elects to make such adjustments to the accounting principles for purposes of determining the closing working capital, it shall also adjust the target working capital calculation using the same adjusted accounting principles to the extent necessary to bring revenue recognition into compliance with GAAP as of the date on which target working capital is determined.’

Both illustrative provisions, implement a parallel adjustment methodology, but with potentially significant differences in outcome. The seller friendly approach minimizes the impact of any GAAP required adjustments to the purchase price adjustment, and the GAAP adjustment could even be in seller’s favor. The buyer friendly approach is permissive in the discretion of the buyer and allows the buyer to select the GAAP compliant approach to be used in the event of accounting errors (from among the acceptable GAAP compliant accounting treatments, which may vary significantly in outcome), meaning that the seller is highly unlikely to benefit from past revenue recognition errors.

Of course, when implementing parallel adjustments for one or more components of working capital, counsel should carefully consider whether parallel adjustment is practicable for the account at issue. The implementation of a parallel adjustment mechanism assumes that an underlying, granular calculation of the target working capital exists. That may not be the case if it is a negotiated amount or is based on, for example, averages. In addition, a parallel adjustment mechanism is not particularly suitable for accounts that are estimates as of the balance sheet date based on the facts and circumstances at the time such as the allowance for doubtful accounts, which we discuss next.

Estimations and Judgments–Accounts Receivable and the Allowance for Doubtful Accounts

Companies that sell products or services on credit record an allowance for doubtful accounts for the potentially uncollectible portion of their outstanding accounts receivable as of a balance sheet date. Deriving the appropriate amount for the allowance for doubtful accounts in accordance with GAAP requires estimations and judgments as to collectability. Reasonable minds may differ, and post-closing, a buyer’s and seller’s respective estimations and judgments may well diverge, easily escalating into formal disputes.

Buyers don’t want to pay dollar-for-dollar for uncollectable accounts receivable balances. Accordingly, a buyer will likely be reluctant to rely solely on the target company’s historical accounting practices because, first, a seller is incentivized to be unrealistic about the collectability of its accounts receivable in general (resulting in a lower allowance for doubtful accounts and a higher working capital balance in favor of the seller), and second, a seller is incentivized to use less stringent credit standards during the period prior to the closing date (also
UK Government Proposals For Reviewing Mergers And Other Investments On National Security Grounds

By Paul Stone, Mark Howard and Daniel Rosenberg

The UK Government has announced a consultation on proposals to implement a new regime for reviewing mergers and other investments on national security grounds. The new regime would represent a significant expansion of the Government’s current powers.

The proposals are set out in a White Paper published on July 24, 2018, which follows a consultation on a Green Paper published in October 2017. The Green Paper led to short term changes with effect from June 11, 2018 to the thresholds for reviewing mergers under the UK merger control rules in three specific areas of the economy, namely military/dual-use, computer processing units and quantum technology, enabling the Government to intervene in a wider range of cases in these areas where national security concerns are raised.

The proposals appear to have been inspired by the US Committee on Foreign Investment in the United States (CFIUS) regime and follow moves towards upgrading powers to intervene on national security grounds in other countries such as Australia, Japan, France and Germany. At the same time the European Union (EU) is actively progressing a new framework for the screening of foreign investments into the EU, which as currently formulated would retain decision making with individual national governments but which would establish harmonized procedures (including information sharing) and would give the EU Commission the right to provide comments to those governments in certain circumstances.

What are the proposed changes?

The UK Government is proposing to introduce a new regime involving voluntary notification, where parties will be encouraged to notify transactions that they consider may raise national security concerns. In order to assist parties with this assessment, the Government is proposing to publish guidance on when it expects national security concerns are likely to arise. This will take the form of a statement of policy intent (a draft of which has been published alongside the White Paper).

Although the new regime will not be mandatory, as with the UK merger control regime (which is also a voluntary regime) where parties decide not to notify the Government will have the ability to intervene of its own initiative, including after the transaction has taken place (within a possible period of up to six months).

The Government is proposing a short preliminary assessment period of 15 working days, with the possibility of an additional period of 15 working days where further time is required. At the end of the preliminary assessment, the Government will call in those cases that raise national security concerns and carry out a full assessment to investigate the concerns. The White Paper envisages a period of up to 30 working days, extendable by a further 45 working days, for this assessment to be completed, with the possibility of further extensions.

Once a transaction has been called in, parties must not complete the transaction until approval has been granted (or, if it is has completed, take any further measures to increase the acquirer’s control or any steps that would make it more difficult for the transaction to be unwound – with the possibility for the Government to impose further interim restrictions). If the Government concludes that there are concerns, it will impose conditions to prevent or mitigate the national security risks. These conditions, which must be necessary and proportionate, can be imposed on any party. In appropriate cases, such conditions could include blocking the transaction or unwinding it, if it has already taken place.

The new rules will apply to any transactions involving an acquisition of control or significant influence over an entity or asset. This will normally be by means of a merger, investment or other commercial activity (including a loan), but may be through any other means. The rules will also apply to the acquisition of any additional means of exerting control or significant influence.

An entity for these purposes covers companies, partnerships and any other form of entity over which control or significant influence may be acquired. Transactions that will be caught will potentially include acquiring more than 25% of an entity’s shares or votes or any other acquisition of significant influence or control over an entity.

An asset for these purposes covers any real or personal property, intellectual property and contractual rights. Transactions that will be caught will potentially include acquisitions of more than 50% of an asset or any other acquisition of significant influence or control over an asset. The proposals will cover new projects, such as new developments and other business activities that are not yet functioning enterprises but can reasonably be expected to have national security relevance. However the proposals will cover assets whether or not they amount, or will when complete amount, to an enterprise.

The transaction must relate to an entity or asset in the UK, a non-UK entity carrying on activities in the UK (or supplying good or services to persons in the UK) or a non-UK asset used in connection with activities taking place in the UK (or the supply of good or services to persons in the UK).

A key issue under the new regime will be whether a transaction raises national security concerns. Here the draft statement of policy intent published with the White Paper identifies three specific risk factors:

1 Paul Stone, Mark Howard and Daniel Rosenberg are partners in the London office of Charles Russell Speechlys LLP.


5 See footnote 3 above.
**Target risk:** where the acquisition of control of entities and assets could be used to undermine national security. These referred to as “core areas” and are likely to be **certain parts of the national infrastructure sectors** (such as civil nuclear, communications defence energy and transport), **certain advanced technologies** (such as advanced materials and manufacturing science, artificial intelligence and machine learning, autonomous robotic systems, computing hardware, cryptographic technology, nanotechnologies, networking and data communication, quantum technology and synthetic biology), **critical direct suppliers to the Government and the emergency service sector** (the example given in the draft statement of policy intent is a business supplying the emergency services with a digital ticketing system for handling and prioritizing incoming contacts, communicating with the public and dispatching emergency services resources, where there are no alternatives available that can be in place quickly if the supplier suddenly could not provide the service) and **military or dual-use technologies**. These are not exhaustive and for example critical suppliers to operators in core areas could also raise target risk, as could the acquisition of land close to a sensitive site. Another example given is if an asset could be manipulated or controlled remotely to extract sensitive information (of a personal or other nature) or if an entity uses processes which could be used to produce or manipulate such assets to enable sensitive information to be extracted (this could include building in ‘listening’ devices into household or business electronics such as TVs or computers which either the user is not aware of or are used for different purposes than those publicized).

**Trigger event risk:** where an entity or asset could undermine national security, for example through disruptive or destructive actions (the ability to corrupt processes or systems), espionage (the ability to have unauthorized access to information or contribute to the proliferation of weapons) or inappropriate leverage (the ability to exploit an investment to dictate or alter services or investment decisions or in other geopolitical or commercial negotiations).

**Acquirer risk:** where an acquirer may seek to use its control over the entity or asset to undermine national security through a range of traditional and non-traditional means. This is key, because the Government is clear that even if an acquisition or other relevant event may pose a target risk and/or trigger event risk, most acquirers do not pose a risk to national security. The draft statement of policy creates a concept of ‘hostile parties’, who may seek to use their acquisition of control over entities or assets in order to undermine the UK’s national security. These include other states that are hostile to the UK’s national security (‘hostile states’) and parties acting on their behalf (‘hostile actors’). In this context the Government considers that foreign nationality could prove to be a national security risk factor, in that foreign nationals may feel an allegiance or loyalty to their home country and may be motivated to undertake activity that may be contrary to the UK’s national security, with the result that they are (comparatively) more likely to pose a risk than UK-based or British acquirers.

The proposed new rules will replace the current power to intervene on national security grounds under the UK merger control rules. They will extend to all sectors of the economy rather than just to the three areas specified in the short term June 2018 changes that followed the Green Paper. However the proposed new rules relate only to national security and will not apply a broader “public interest” test. Other public interest issues (namely plurality of the media and financial stability) will remain within the UK’s merger control regime and the Green Paper concluded that no changes to them were currently needed.

The regime will be the responsibility of a Cabinet-level Government Minister rather than of the Competition and Markets Authority (which is a non-ministerial Government department in the United Kingdom, with a specifically competition-focused remit). Appeals against the Minister’s decisions will be heard by the High Court under the judicial review process, which reviews the way in which a decision has been made rather than whether it is substantively correct. The proposed legislation will permit the use of Closed Material Proceedings to protect sensitive material mirroring similar procedures under the Terrorism Prevention and Investigation Measures Act 2011.

**When will the changes come into effect?**

As indicated above, the short term changes which followed the October 2017 Green Paper took effect on June 11, 2018 and reduced the thresholds for reviewing mergers under the UK merger control rules in the military/dual-use, computer processing units and quantum technology sectors. For example the UK revenue test for target entities in these three sectors was reduced from the usual £70 million threshold to £1 million. These changes are expected to be superseded when the further proposals outlined in the White Paper come into effect.

The proposals outlined in the White Paper are not yet final and the deadline for responses to the White Paper is October 16, 2018.

As part of the implementation of the proposals, the Government will need to work closely with the UK Panel on Takeovers and Mergers to consider how the proposed reforms would interact with the UK City Code on Takeovers and Mergers, which broadly speaking applies to offers for the shares of UK public companies whose securities are traded on the Main Market of the London Stock Exchange or on the Alternative Investment Market and which sets out the process for such offers but does not require or entitle the Takeover Panel to consider their merits. The Government will also need to consider how the regime will interact with the existing UK competition regime, as a proposed transaction may require review both by the Competition and Markets Authority (CMA) on existing competition grounds and by Government Ministers on national security grounds.

The new regime will also need to interact with the proposed new EU framework for the screening of foreign investments into the EU referred to above and with the existing EU Merger Regulation, which where applicable provides for a review of transactions on competition grounds by the European Commission in place of a competition review at national level. Although in these circumstances individual EU Member States can still conduct a national security review, EU law prohibits discrimination against other EU persons on nationality grounds which will constrain the Government’s ability to apply its new national security regime to entities or individuals from elsewhere in the EU. These considerations will of course only apply for so long as the relevant EU rules continue to apply to the UK.
Warranty and Indemnity Insurance in Europe: Recent Trends

By John Bennett¹

OVERVIEW

Warranty and indemnity insurance is equivalent to representations and warranties insurance in the US although there are variations in coverage reflecting differences in M&A practice in the US. In addition premium rates and retention levels are generally higher in the US as a consequence of generally less seller-friendly deal terms and a more litigious society.

The London market is the biggest and most established market for warranty and indemnity ("W&I") insurance. Most W&I insurance used on European corporate deals is written through London. The volume and value of insured deals has continued to grow across Europe although market penetration in Belgium and France is still reported to be relatively low. Notwithstanding the Brexit vote, the UK remains the largest and most developed market for underwritten deals reflecting the relative scale of the UK M&A market. There are pricing differences and other local market nuances between different jurisdictions in Europe but we should expect some convergence in future as insurers get increasingly familiar with newer markets.

The growth in the use of warranty and indemnity insurance over the last ten years was originally driven by financial sponsors such as private equity firms refusing to give business and tax warranties and indemnities and seeking to achieve clean exits and avoid residual liabilities which would impact on their ability to make distributions to their investors. However, W&I insurance is now used for a variety of reasons on deals where there are corporate and individual sellers.

The sweet spot for W&I insurance continues to be mid-market private deals but there has been a significant increase in the number of deals insured across Europe where the enterprise value of the target is €1bn plus.

Increased capacity at incumbent insurers and new market entrants have led to increased competition and downward pressure on premiums and retentions while coverage positions have been enhanced. As result more buyers and their advisers view W&I insurance as a sensible and credible deal protection measure.

Although a W&I policy can be taken out by either the seller or the buyer, buyer policies have become the norm. These enable the parties to bridge the gap between the typical deal protections given by the seller or which the seller is able and willing to give and the comfort required by the buyer and its funders. They also give the buyer direct recourse against the insurance policy. Sellers are increasingly including stapled W&I insurance solutions in auction processes. In these cases the seller’s broker will discuss the terms of the proposed buyer policy and the placement process with potential bidders.

PRICING

Premium

Premiums will depend on various factors including:

- the size of the deal. Smaller and larger deals (€5m>cover>€300) tend to incur higher premium rates;
- the amount of insurance bought in relation to deal size;
- the level of policy excess;
- the breadth and qualifications of warranty statements and the quality of disclosure and due diligence;
- the geography of the target business and the law and jurisdiction of the SPA;
- the sector in which the target business operates. In particular property deals are much more keenly priced;
- the identity of the parties and their professional advisers;
- policy coverage and enhancements (see below).

However as a rule of thumb, for operational businesses, premiums for W&I insurance for European deals normally range between 0.9%—1.75% of the policy limit and less for corporate real estate deals.

Deductible, retention or policy excess

The policy deductible will generally match the reduced liability of sellers or management under the SPA or warranty deed. However, depending on the circumstances, it is not uncommon for the seller or management to exit with a nominal cap or no risk. The buyer then bears the loss up the deductible figure.

This has resulted in buyers seeking lower policy deductibles. For operational businesses the average deductible is typically 0.5% of enterprise value and may even drop to a lower level after the time period in the SPA for non-tax warranty claims to be notified. It is possible to obtain a “nil” deductible for real estate deals although partly operational real estate platforms (such as in student housing, health care, hotels and leisure) still command deductibles of about 0.1% of the enterprise value. For real estate transactions where there is a deductible, insurers will often offer a tipping instead of a fixed deductible.

AMOUNT AND DURATION OF COVER

One of the advantages of a buyer policy is that it typically provides the buyer with the protection they would otherwise

¹ John Bennett is a partner in the London office of Bryan Cave Leighton Paisner LLP.
have gained from a higher warranty cap or a longer warranty survival period. It is not unusual for survival periods of 24 months or more for general warranties and seven years for fundamental warranties and tax whereas survival periods for claims against the seller in the SPA are now typically shorter.

OTHER POLICY ENHANCEMENTS

Knowledge scrape

Sellers (or management) may be reluctant to give warranties without a "knowledge qualifier" which applies generally to all warranties other than fundamental warranties dealing with title to shares and capacity to sell. It is not unusual for the policy to disapply the general knowledge qualifier so that the insurer underwrites the warranties without any knowledge qualification but then specific knowledge qualifiers are applied to certain warranties (or parts of warranties) that would ordinarily be qualified or where the insurer is uncomfortable.

US style enhancements

Certain insurers are beginning to offer a US style enhancement such as ignoring general disclosure of the data room and/or due diligence reports for the purposes of the policy on European deals in order to bridge the gap between typical deal terms in Europe and the US.

Measure of loss

Some insurers, after due diligence, will allow indirect and "reasonably foreseeable" consequential loss and lost profits to be claimed under the policy even if only direct losses are offered under the SPA.

New breach cover

When there is a split signing and closing the warranties are typically given at signing and may be repeated at closing. The insurance policy is typically taken out at signing and covers the warranties given at exchange. Historically the policy would not extend to warranties repeated at closing in respect of breaches that occur between signing and closing. However, insurers have become more willing, on a case by case basis, to consider cover where a breach of warranty has occurred or is discovered between signing and closing in return for an increased premium.

Coverage for warranties repeated at closing may only be given if there is a supplemental disclosure mechanism built into the SPA and/or the insurers will want a no claims declaration from the buyer against the closing warranties.

Synthetic tax covenant and synthetic warranties

In certain circumstances, particularly on corporate real estate transactions where the assets have been held in SPVs or if the seller has a solvency issue, some insurers have offered cover after comprehensive disclosure and due diligence on the basis of a so-called synthetic tax covenant/indemnity and even (though this is unusual) general warranties negotiated with the insurer in circumstances where the seller does not give such protections and therefore has no risk. Synthetic warranties are not offered where the target business is an operational business. Insurers prefer to provide cover where the warranties and tax covenants are given by the sellers even if their liability is capped at a nominal amount.

Affirmative tax cover

Most insurers are willing to provide affirmative cover for risks identified as “low” or “very low” in the tax due diligence. This means that, for the purposes of the policy, such risks are not considered “disclosed” and will not therefore fall outside the scope of cover.

CLAIMS

With the increase in the number of policies being written there has been an increase in the number of notifications. Claims history varies across European jurisdictions. Interestingly targets operating in the United Kingdom have experienced the lowest notifications to transactions volume ratio.

CONCLUSION

As evidenced by these trends, Europe has continued to experience a buyers’ market for W&I insurance. However, richer data on claims experience is likely to influence the scope of cover, exclusions and pricing in future. While pricing and, increasingly, flexibility in negotiating policy terms and conditions will continue to influence the choice of insurer, we should expect the experience of claims handling to become an important factor in deciding which broker and insurer to use on deals in future.
Case Study – Working with Document Automation Technology

By Kevin Kyte

The following is the first in a series of case studies published by the Technology in M&A Subcommittee on the increasing use of technology tools in the practice of M&A. For the Subcommittee’s directory of technologies being used in M&A see the Subcommittee’s homepage at https://apps.americanbar.org/dch/committee.cfm?com=CL560026

Document automation or document assembly tools code repeated elements of a document or suite of documents. When a new document needs to be created, the user completes a questionnaire and the document is generated based on those answers. The questionnaire will collect data for the document such as the names of the parties as well as information that will control which clauses are included.

Our firm has been using document automation programs for nearly 25 years. Indeed, in the early 1990s one of my banking partners developed his own software to assemble standard banking agreements (loans, security agreements, etc.). Our corporate paralegals also use this tool for basic corporate precedents (annual resolutions, dividends, etc.).

But my experience so far has been that many practicing lawyers have been too slow to adopt this technology. Part of the challenge is convincing them that it is worth their time. It is the dilemma of not having a spare hour to save two hours of work.

And here is the revelation hiding in plain sight: you don’t have to be a techie to make this work for you!

As the Chair of the office’s KM and Innovation Committee and a member of the firm’s IT priority Board, I decided to give it a try this year. Our firm has been using Thomson Reuters Contract Express® for ten years. While we had tested other products, my experience was directly with Contract Express. I know there are other great products out there.

The process was surprisingly simple. I lined up our KM group to help me. While I have been told that practicing lawyers can code their agreements, this is not something that interested me. To begin with, I chose not an M&A agreement (more on the M&A possibilities below), but a pharma license and distribution agreement. Over the last several years, I have developed a wide ranging pharma practice, a legacy of pharma M&A deals. Working with clients, I have developed a well-tested form of license and distribution agreement: I know the variables - the provisions that are most often negotiated. My “model” on Word already had alternate clauses in square brackets. We would manually change them each time we did a new agreement. The process was as follows:

- I drafted a memo listing each variable that was likely to come up: for example, governing law, withholding taxes, IP risk, and payment terms.
- I offered clear alternatives for each issue in prose (“if no withholding taxes gross up, delete subsection (a) and keep subsection (b)”).
- Although we do have coding expertise internally, we decided for timing reasons to outsource this particular project to Pangea 3 US LLC, which is a legal process outsourcing company, part of the Thomson Reuters group, that provides automation services using Contract Express. Confidentiality agreements were put in place, although no client confidential information was given to Pangea.
- The memo and the model agreement were then sent to our designated project manager at Pangea. The PM automated the form and turned it around in about 72 hours. The KM team was the contact point with our PM, which made the process seamless for me. They answered any substantive questions the programmer had and tested the form they sent back to ensure it matched the various templates I had provided.
- The KM team then sent me a link to Contract Express which directs me to my automated template, as well as other models in our system. I can now generate various agreements as regular Microsoft Word documents based on fact patterns customized for each deal. I answer each question (for example, name of client, name of counterparty, date, etc.) on a web-based questionnaire. Contract Express then generates the agreement which I save as a Word document on our document management system. Every deal is different, so I then have some manual customization to do.

The process was surprisingly quick. And one of the unexpected benefits was that I had to carefully scrutinize my own form of agreement to get it ready. This process allowed me to make our standard form of agreement even stronger.

The end result? We can now do these license and distribution agreements in about a third of the time that it used to take us. About 17 minutes using Contract Express, then about 5 minutes for manual customization. The product is consistent and easy to improve: If I want to further improve our model, I send modifications in Track Changes to our programmer. The turnaround is less than a day. My clients know that I use this tool; I use it as a selling point to show our efficiency. And it is surprisingly a good teaching tool for junior lawyers since you take them though each of the variables.

My experience has been that these products work best on agreements with a manageable number of fairly predictable variables: NDAs, exclusivity agreements, non-competition agreements, service agreements, licence and distribution agreements, and basic corporate service precedents such as annual resolutions and share conditions. I have not yet attempted to run an M&A purchase agreement through Contract Express. Each M&A purchase agreement tends to have a large number of unique deal points, although admittedly there are several basic elements at the start of the drafting process that would do well with a document assembly program: one vendor or many vendors; one target corporation or a target with

Kevin Kyte is a partner in the Montreal office of Stikeman Elliott LLP.
subsidiaries; joint and several liability of vendors, etc. I am not saying that it cannot be done. I have just not have had the time. It certainly helps if your firm has a dedicated resource that both understands deals and knows how to customize agreements for the automation program.

My dream, and maybe someone will tell me that it already exists, is to have a product which is both document assembly and AI such that you can, for example, quickly turn a highly negotiated draft share purchase agreement into an asset purchase agreement when the structure changes, such that you do not have to redraft all of the negotiated changes in the SPA that would also apply to the APA.
Back to the Future? Representations & Warranties Insurance in Latin American Transactions

By Rubén Kraiem

Historically – that is, until the advent of "New York style" acquisition agreements introduced at different times in recent years throughout the region – buyers and sellers in Latin America would typically structure M&A transactions to allow for a "clean break:" sellers would have minimal post-closing exposure for losses arising from circumstances or events associated with the transferred business. Outright fraud or demonstrable errors in financial reporting would be the only exceptions. In many cases, this went along with minimal due diligence or disclosure pre-signing, and a simultaneous signing and close of the transaction. In presenting their offers and negotiating a transaction, buyers would rely principally on their knowledge of the markets and industries involved. They would have access only to financial reports and a few other concrete items of due diligence that were deemed essential, and obtain minimal representations concerning only that very limited disclosure.

These practices were used with full knowledge that they might result in a somewhat reduced valuation for the transferred businesses; buyers knew that they would have limited recourse post-closing for a variety of risks and contingencies, and would naturally discount their offer price (thereby effectively "self-insuring" for those risks or contingencies). Sellers would accept that discounted price in return for having little risk of facing indemnity claims for risks that were generally perceived to be impractical to address in a contractual context.

Practice has since evolved in the direction of having a robust pre-signing due diligence process, fulsome representations and warranties covering a range of events and circumstances relevant to the business (sometimes even with a catchall "full disclosure" representation), confirmatory due diligence between signing and close and, most importantly, a set of indemnity provisions that would entitle the buyer to claim against the seller for losses arising by reason of any breach of those representations and warranties. In many cases, there’s also a statement that buyer’s knowledge pre-closing of any event or circumstance constituting a breach of the representations and warranties will not, without more, preclude a claim for post-closing indemnity (i.e., the very opposite of an “anti-sandbagging” provision).

An important development in M&A practice, increasingly common in the United States market but with limited penetration thus far in Latin America, has the potential to once again transform Latin American practice – and quite possibly move the overall market in the direction of being even more efficient and more competitive: namely, the inclusion of representations and warranties insurance (RWI) as a tool for managing and allocating risk.

The typical RWI policy works as follows:

- The buyer and seller will have negotiated a normal "package" of representations and warranties, and seller will have agreed to indemnify buyer for losses arising from any breach of those representations and warranties. However, the seller’s indemnity obligation will be subject to (1) an agreed deductible (i.e., no indemnity except for losses cumulatively in excess of a certain amount); (2) a very low cap (say, twice the amount of the deductible itself), and (3) a relatively short "survival" period (possibly as short as 12 months from closing). Thus, while seller will have at least some exposure (and have a small, albeit meaningful, incentive to be prudent in terms of what representations and warranties it is willing to give), it will be a very limited indemnity, far below what would be considered "market" in a normal M&A transaction.

- Armed with that package of representations and warranties, the buyer will contract with an insurer who will be given access to (but may or may not choose to delve deeply into) all existing due diligence materials, including typically a set of GAAP audited financials for the acquired business, and who will underwrite and issue an RWI policy, agreeing to cover losses incurred by buyer (or by the acquired business) arising from the breach of those representations, subject to:
  1. various exclusions for particular risks the insurer is unwilling to assume (more on that below);
  2. an agreed deductible that is equal to whatever cap the seller has agreed to give for its indemnity exposure (and adjusted down, when seller’s indemnity obligation expires, to the lower deductible originally agreed by buyer and seller as being buyer’s risk);
  3. a coverage limit (large enough that the buyer feels it is very unlikely losses would exceed that amount, but within which boundaries will keep the premium RWI affordable); and

---

1 Partner, Covington & Burling, LLP. This note has benefited from insightful comments by Gabriel Mesa and David Schwartzbaum.
3 In more unusual cases, seller will agree only to representations and warranties that are given as a condition of closing (i.e., that those representations and warranties must be true, or true in all material respects, or true except for any breach that does not have a material adverse effect), but provide no indemnity post-closing. This reduces somewhat the incentive for seller to negotiate prudently, and thus poses a somewhat larger underwriting risk for the insurer.
4 It is possible also that the seller will approach a RWI underwriter and negotiate the terms of a policy, which is then “stapled” to the seller’s very limited indemnity and presented as a piece of the auction “package.” Buyer will then be expected to absorb the premium cost associated with the policy, either by paying for it directly or factoring it as an upward adjustment to its valuation of the acquired business.
5 RWI does not, by definition, cover other types of seller obligations, such as with respect to purchase price adjustments that are done post-closing on the basis of working capital, debt or other accounting true-ups. Careful drafting is needed in order to ensure that parties understand and address areas of potential overlap between post-closing price adjustment provisions and representations and warranties that cover at least some of the variables, like inventory and sales-channel management, and/or the use of financial leverage, that could also drive those adjustments.
4. the functional equivalent of an “anti-sandbagging” provision: the buyer will represent to the insurer, typically by delivery of a statement to that effect upon issuance of the policy and, if later, at closing of the acquisition, that it (meaning, for purposes of the policy, a certain set of identified individuals) has no actual knowledge, sometimes defined as “actual conscious awareness and personal knowledge” and expressly excluding “imputed or constructive knowledge,” of any events or circumstances constituting breach of the covered representations and warranties.

- If and when claims for indemnity do in fact arise, the buyer will first absorb losses up to the deductible amount, and then claim against the seller to the extent of its (very limited, if any) exposure under the indemnity provisions of the purchase agreement. The idea behind RWI is that (1) at least to the extent of the risks that it does in fact cover, all of buyer’s additional recovery, up to the amount of the policy limit, will be paid under the RWI policy by the insurer; and (2) the insurer will not have a right of subrogation as against the seller (so seller will not have any back-to-back exposure, which would defeat the purpose of not giving an indemnity), except in cases where there has been fraud or intentional misrepresentation by seller – and in such cases buyer should in any case have a claim against the seller (to which the insurer would be subrogated) that is not affected by the indemnity cap.

The striking result is that, for the parties to an RWI-covered transaction, the position is very nearly the same, at least to the extent of the risks covered by the policy itself, as it would have been if the parties had followed the historic M&A practice in the region – i.e., before “NY law style” transactions were the norm; (1) little, if any, contractual indemnity exposure to the seller; (2) a somewhat discounted purchase price (inasmuch as buyer will presumably deduct the premium it needs to pay to the insurer, unless it is unable to do so for competitive reasons) that is nevertheless significantly protected from claims; and (3) a bias in favor of buyer assuming risks of which it has, for whatever reason, actual knowledge. Material liability exposure for the seller, at least for those items covered by the RWI policy, is limited to cases of fraud or intentional misrepresentation. However, the buyer is not (and this is obviously the critical difference) required to self-insure. Instead, the insurer has stepped into the shoes of the seller as indemnifying party – in return, of course, for a premium paid to it by buyer – subject only to an “anti-sandbagging” representation by buyer and whatever other limits or exclusions have been agreed.

As of this writing, few insurers have worked to penetrate the Latin American M&A market. So even in the larger jurisdictions (like Mexico and Brazil), only one or two companies are ready to offer RWI policies. Pricing is therefore not nearly as competitive as it is in the United States. More importantly, the coverage exclusions that insurers are likely to require in the Latin American market specifically are so broad that the policy may be of limited (if any) value to a prospective buyer, who may prefer simply to self-insure for those few risks that the insurer would otherwise be willing to cover. Exclusions that are especially problematic, but still commonly used on the basis that the risks involved are simply too difficult to underwrite, include carve-outs for: (1) environmental risks; (2) regulatory non-compliance, whether or not the seller has knowledge of the non-conforming conduct in question (i.e., irrespective of whether there is “fraud or intentional misrepresentation”); (3) tax risk; (4) labor risk; and (5) corruption/improper payments.

Many of the structural challenges that are typically encountered in M&A transactions, for at least many of the key markets in the region, present obstacles here: a lack of transparency and predictability in regulatory enforcement, a tendency still to apply “form over substance” in designing tax and other compliance strategies, and the sheer difficulty parties often encounter in compiling a proper record of due diligence. A very interesting set of questions is likely also to arise in terms of (1) ensuring that expressions such as “fraud or intentional misrepresentation” are interpreted in a manner that is consistent and predictable under applicable law, (2) aligning expectations as to what the “anti-sandbagging” representation by the buyer does or not cover, and (3) what law should apply to the acquisition agreement in order for the insurer to underwrite its policy in the first place (in nearly all cases, the insurer will require that the law governing the insurance contract also be used as the governing law of the underlying acquisition agreement).

That said, if experience is a guide then it seems likely that this market trend will, as other “transplants” have done, become more and more the norm in the region, especially as the regulatory mechanisms that drive any eventual exposure become somewhat more transparent and predictable, and as auditing/accounting/enforcement practices align increasingly across jurisdictions – thus providing a sounder basis for underwriting. If and when the issuance of RWI policies becomes commonplace in Latin American M&A deals, the market will have travelled, as the expression goes, “back to the future:” the old deal dynamic will likely reassert itself, with sellers once again insisting on a clean break – and buyers being willing to price their bids accordingly, while effectively outsourcing their indemnity coverage.

But RWI will not only enable sellers to better manage and reduce their exposure: it has the potential also to simplify the actual deal negotiation and, if properly structured and agreed by knowledgeable parties, improve available valuations, create more efficient and competitive sales processes (with considerably less friction between the eventual buyer and seller, both before and after closing) and stimulate the market generally. If the price is right (i.e., if the premium is affordable for the extent of coverage offered), it should offer the best of both worlds: a relatively clean break for the seller and the efficient outsourcing of risk by the buyer. Parties and advisors who understand the product, and are able to use it as a competitive tool, will have a corresponding advantage in this new market.

---

6 That said, the fact that the insurer offers what is – by definition – a highly reliable credit should help a prospective buyer in making a more competitive bid, inasmuch as the collection risk is less likely to be discounted from the offered price.

7 One interesting illustration of this relates to the use of holdbacks and/or escrow provisions that often accompany a seller’s indemnity obligation and raise difficult credit and risk-allocation issues. Naturally, the use of RWI reduces the need for this sort of tool and will thus streamline negotiations.
JOINT TASK FORCE ON GOVERNANCE ISSUES ARISING IN BUSINESS COMBINATION TRANSACTIONS

Thanks to the hard work of our many authors, our Task Force is getting very close to publication of our handbook covering the many governance issues confronted by boards of directors engaged in an M&A transaction. The four co-chairs, who have been serving as the editorial board, have been hard at work this summer editing the various chapters and working with the authors. We have enlisted the great help of two quality reviewers—Steve Bigler and Joel Greenberg. They have provided fabulous input which we are currently incorporating into each chapter. Thanks Steve and Joel for your hard work! We are on track to deliver a manuscript to the ABA before Thanksgiving, which tees us up for an official launch at the Spring Meeting in Vancouver! We are working with the ABA on marketing ideas and are excited for the roll-out! We will not be meeting as a Task Force in Austin, but we look forward to seeing many of you there!

DIANE HOLT FRANKLE, CO-CHAIR
MICHAEL J. HALLORAN, CO-CHAIR
LAWRENCE A. HAMERMESH, CO-CHAIR
PATRICIA O. VELLA, CO-CHAIR

TASK FORCE ON LEGAL PROJECT MANAGEMENT

The Task Force put on a special program at the Spring Business Section Meeting in Orlando in conjunction with the publication of the Second Edition of its Guidebook, Using Legal Project Management in Merger and Acquisition Transactions.

The panelists for the program included Task Force Co-chairs Byron Kalogerou and Den White along with Samantha Horn of Montreal who spearheaded and discussed the development of a carveout transaction checklist; and Rainer Loges of Munich provided an overview of a multi-jurisdictional transaction checklist that was developed by a working group he led. The panel also covered three new additional tools that appear in the new edition: a post-acquisition transaction checklist, a deal magnitude and complexity tool and a budgeting tool.

The ABA reports that the new edition of the Guidebook is selling briskly.

The next meeting of the Task Force will be held at 1:00 pm (CST) on Friday, September 14 at the Annual Meeting of the Business Section in Austin. Our in person session will be held at the Fairmont Hotel, Sunflower Room, 4th floor. Dial-in information for those who cannot attend will be found elsewhere in this edition of Deal Points.

Topics we will be discussing at the upcoming meeting include the following:

- Ways in which we might collaborate with the newly formed committee, Technology in M&A, on identifying and evaluating project management software products.
- Possible new tools we might explore, including a tool for capturing due diligence findings of material nature for use when it comes time to draft representations and warranties and handling post-closing integration matters.
- The fashioning of an electronic survey to gain a better sense of the extent to which and how the Guidebook's LPM tools are being utilized.

It should be an interesting session. We look forward to seeing many of you in Austin.

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR
AILEEN LEVENTON, PROJECT MANAGER

TASK FORCE ON FINANCIAL ADVISOR DISCLOSURE

The next meeting of the Financial Advisor Task Force will on September 15 at 2:00 pm (CST) at the Fairmont Hotel in Austin during the annual meeting of the Business Law Section. Please see the schedule on page 26 for the precise location and dial-in information for the meeting.

We will spend the bulk of the hour discussing a recurring process issue for financial advisors: what to do when the situation suggests, either through feedback from marketing efforts or otherwise, that management projections are optimistic? In this discussion, we hope to cover emerging market practices to address projection issues earlier in the process, disclosure practices in the context of revised projections, and steps financial advisors may take to ensure – for their benefit and the benefit of the board – that their fairness opinion is based on projections representing management’s current best estimate. Time permitting, we may also discuss an anticipated decision from the Court of Chancery addressing aiding and abetting liability.

T. BRAD DAVEY, CHAIR
JOINT TASK FORCE ON M&A LITIGATION

Please join the Joint Task Force for M&A Litigation to discuss market efficiency and its impact on appraisal and other M&A litigation. We will be joined by two economists from The Brattle Group, who will lead a discussion on questions such as:

- What is market efficiency?
- How does DE’s evolving emphasis on market efficiency compare to the economic and legal concepts of market efficiency in securities litigation?
- What does market efficiency (or lack thereof) imply for equity valuation?

TASK FORCE ON REVISED MODEL ASSET PURCHASE AGREEMENT

The Task Force has now moved to the editorial stage. A group of Task Force members has consolidated the work of the small groups and is now reviewing the updated draft model agreement and commentary. With this work underway, the Task Force will not be meeting in the immediate future.

ED DEIBERT, CO-CHAIR
JOHN CLIFFORD, CO-CHAIR

TASK FORCE ON WOMEN IN M&A

In our last Women in M&A Task Force meeting, we provided an update on our law school initiatives and summarized our Women in M&A survey and website ideas that came out of our last meeting. The main portion of the meeting was devoted to the advancement of our law firm presentation. Our goal is to have the presentation finalized for our Laguna Beach meeting in January.

We look forward to seeing you all at our next meeting on Friday, September 14 from 2:30 pm - 3:30 pm. Our meeting will include a panel discussion addressing real world situations in which the many forms of bias disproportionately impacting women in the deal making world, spanning from career advancement to team building and professional relationships. The discussion will include audience participation, candid “in the field” personal experience, and current scientific studies on bias in the workplace. The panel will also focus on the identification of the manifestations of unconscious bias in the M&A world and solutions-oriented strategies for men and women. Panelists will include Samantha Horn, Joanna Lin and John Clifford and will be moderated by Rita O’Neill.

We hope you will join us for the Women in M&A Reception on Friday, September 14 from 5:30 pm – 6:30 pm. Many thanks to Potter Anderson & Corroon and Fasken for sponsoring this event.

For those of you that cannot join our meeting in person, we will be using the dial-in number listed for this meeting.

MELISSA DIVINCENZO, CO-CHAIR
AMY SIMMERMAN, CO-CHAIR
TATJANA PATERNO, VICE-CHAIR

LEWIS H. LAZARUS, CO-CHAIR
YVETTE AUSTIN SMITH, CO-CHAIR

LEWIS H. LAZARUS, CO-CHAIR
YVETTE AUSTIN SMITH, CO-CHAIR

JOHN CLIFFORD, CO-CHAIR

MELISSA DIVINCENZO, CO-CHAIR
AMY SIMMERMAN, CO-CHAIR
TATJANA PATERNO, VICE-CHAIR

ED DEIBERT, CO-CHAIR
JOHN CLIFFORD, CO-CHAIR

JENNIFER MULLER, CHAIR
RITA-ANNE O’NEILL, VICE-CHAIR
JOINT TASK FORCE ON SHORT FORM MODEL ACQUISITION AGREEMENTS

The Joint Task Force on Model Short Form M&A Documents held its inaugural meeting during the ABA Business Law Section Spring Meeting in Orlando in April. As previously mentioned, the goal of the Joint Task Force is to publish a set of “short form” acquisition agreements (with ancillary documents and commentary) which would be more easily adapted for use in smaller M&A transactions than the “long form” Model Stock Purchase Agreement and Model Asset Purchase Agreement published by the M&A Committee. At the meeting in Orlando, we reviewed the progress that has been made to date by the Middle Market and Small Business Committee on the model short form stock purchase agreement and the model short form asset purchase agreement. We also engaged in a discussion of next steps which included modeling the short forms more closely to the long forms and a plan to address many substantive topics in depth in the commentary.

At the upcoming ABA Business Law Section Annual Meeting in Austin, the Joint Task Force will be focusing on the current working draft of the model short form stock purchase agreement and will develop a work plan to assign the various projects that have been identified as next steps. We are actively looking for volunteers and there is plenty of opportunity to lead one of the various projects. The Joint Task Force will also engage in a substantive discussion regarding the third party claims provision of the indemnity section. We will explore how task force members address this provision in the short form context.

The next Joint Task Force meeting will occur in person and by teleconference on Friday, September 14 from 1:00 pm - 2:00 pm. See the schedule on page 26 for room location and dial-in details. We look forward to seeing you in Austin and encourage you to get involved with this project.

JASON BALOG, CO-CHAIR
ERIC GRABEN, CO-CHAIR

INTERNATIONAL M&A SUBCOMMITTEE

The International M&A Subcommittee will meet in Austin on Saturday, September 15 between 9:00 am - 10:30 am at the Fairmont Austin. We have put together an agenda dedicated to cross border deal making and how the M&A practitioner can minimize the risks of soft issues muddying the waters of negotiations. We strongly encourage you to attend the meeting.

Agenda

1. Introductions
   a. Comment on last meetings activities
      i. Report by Jen Muller on first quarter of 2017
      ii. Overview of regulatory and tax activities by the Trump administration

2. Projects
   a. Contributions to Deal Points
   b. Joint project with the International Subcommittee of the Private Equity and Venture Capital Committee

3. An overview of the International M&A market during the second quarter of 2018
   Jennifer Muller, Managing Director, Houlihan & Lokey

4. Presentation: Life Cycle of and Cultural Issues; Doing deals with family businesses in China, India and Ireland

Moderator:
   Jessica Pearlman, Partner, K&L Gates LLP;
   Seattle, Washington

Panelists:
   John Du, Partner, JunHe LLP;
   Beijing and New York, New York
   Akil Hirani, Managing Partner, Majmudar & Partners,
   Mumbai India
   John Barrett, Partner, Arthur Cox;
   Dublin, Ireland

RICHARD SILBERSTEIN, CHAIR
JEFF LABINE, VICE-CHAIR
M&A JURISPRUDENCE SUBCOMMITTEE

The M&A Jurisprudence Subcommittee will meet soon in Austin:

**Friday, September 14**
9:00 am - 10:30 am

Dial-in information for the meeting is included in the schedule on page 26.

At the meeting we will discuss:

- as many recent M&A related court decisions as we can get to in our allotted time
- topics under review by the Judicial Interpretations Working Group, including the ongoing LLC fiduciary memo.
- A short summary of *Morrison v. Berry* (re The Fresh Market) is attached below. Other cases and materials will be distributed by email before the meeting. If you don’t get the email, but would like to, please let one of us know.

**Bonus Program:**

John Lawrence and Dan Peters will lead a panel on Successor Liability in Asset Acquisition Transactions, on Friday September 14 from 3:30 pm – 5:00 pm (in Fairmont Indigo, 4th floor). Byron Egan and Melissa DiVincenzo will co-moderate. A great follow-up to all their work on their memo!

As always, we need cases! And more memo topics!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. We also would like your ideas on topics for future issues memos. Cases and ideas for topics can be sent to Nate, Frederic or me (emails below). We rely on members to help identify important cases from all jurisdictions.

**More generally:**

For those of you who don’t know us, the M&A Jurisprudence Subcommittee keeps its members and the Committee up-to-date on judicial developments relating to M&A. Our Subcommittee includes:

- 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 M&A, which is published in *The Business Lawyer*. The Annual Surveys also are posted in the online M&A Lawyers’ Library, which Committee members can access from the Committee’s home page on the ABA website (http://apps.americanbar.org/dch/committee.cfm?com=CL560000).

MEMBERSHIP SUBCOMMITTEE

A force to be reckoned with: In the last issue of *Deal Points*, the Membership Subcommittee provided a detailed overview of the Mergers and Acquisitions Committee membership. Since then, our membership has continued to grow, with 55 new members so far in 2018, bringing our total membership to 5,243!

We remain the largest Committee in the ABA Business Law Section, but we are always looking to grow and further diversify the membership base. If you have any colleagues who might be interested in becoming a member of the Committee, please do encourage them to come along to the Committee’s meetings, programs and other events at the upcoming Section Meeting in Austin.

**Upcoming Membership Initiatives**

**Ambassador Program:**

We want all first-time attendees to feel welcome at our meetings and what better way to do so than by pairing them up with seasoned M&A committee veterans. These ambassadors will help first-time attendees navigate the meeting landscape by helping them sort out their schedule, figure out receptions and dinners to attend, etc. We are actively searching for ambassadors for the annual meeting so please reach out if you are interested.

**Section-Wide Events:**

In addition to the exciting roster of events being hosted by the Mergers and Acquisitions Committee itself, we would also encourage both new and seasoned members to try to attend the following section-wide events which will provide good opportunities to meet and welcome new members:

- **First-Timers Welcome Breakfast**
  Thursday, September 13
  9:30 am - 10:30 am
  Manchester Ballroom E, 5th Floor

  All first-time meeting attendees are invited to this special welcome breakfast. Meet with Business Law Section Chair, Christopher Rockers, and committee leaders to gain insight on navigating the meeting.

- **Icebreaker Reception**
  Thursday, September 13
  5:00 pm - 6:00 pm
  Manchester Ballroom C, 5th Floor

  Whether you are a young or experienced lawyer, a new or long-time Section member, or a first-time or return meeting attendee, we invite you to attend this reception to break the ice with new colleagues before the Welcome Reception.

  We look forward to seeing you in Austin!

TRACY W. BRADLEY, CHAIR
GINA CONHEADY, VICE-CHAIR
Market), Delaware Supreme Court Reverses Dismissal of doctrine — which gives directors the benefit of the business closing, from stockholder claims. Emphasizes the importance of providing, before closing, proper disclosures to stockholders in order to defend directors, after amending or supplementing the prior disclosures. The cases demonstrate the need, before stockholder action (such as a vote or a tender) is taken, for directors and companies to make proper disclosure to stockholders so that the directors can obtain the benefit of the business judgment rule and end litigation at an early stage.

Morrison v. Berry (The Fresh Market)

In Morrison v. Berry (Del. July 9, 2018), the company had agreed to be acquired by a private equity firm in a transaction in which the company’s founder had agreed with the acquirer to roll over his existing equity stake into shares of the acquirer’s entity, rather than selling his shares for cash along with the other stockholders. The company issued a Schedule 14D-9 with the board of directors’ recommendation that stockholders accept the tender offer. After the acquisition closed, a plaintiff shareholder filed suit against the directors for breaches of their fiduciary duties. The Court of Chancery, after reviewing the company’s disclosures, found that the transaction was “an exemplary case of the utility of the ratification doctrine, as set forth in Corwin.”

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary.

To be included, a decision must:

1. 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

2. (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 exclusively 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.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

Case for Discussion: In Morrison v. Berry (aka The Fresh Market), Delaware Supreme Court Reverses Dismissal of Claim Against Directors and Emphasizes Duty to Make Proper Disclosures to Stockholders

A pair of recent decisions from the Delaware Supreme Court in connection with completed acquisitions of public companies emphasizes the importance of providing, before closing, proper disclosures to stockholders in order to defend directors, after closing, from stockholder claims.

In both cases, the Court of Chancery had relied on the Corwin doctrine — which gives directors the benefit of the business judgment rule in most cases when a transaction has been ratified by a fully informed and uncoerced majority of disinterested stockholders — to dismiss stockholder claims that directors breached their fiduciary duties. In both cases, the Supreme Court reversed, finding that the disclosures made to stockholders had omitted material information or had been materially misleading. According to the Supreme Court, the Corwin doctrine must be “carefully” applied, given its potentially dispositive impact, and cannot be supported by “partial and elliptical disclosures.”

As has become increasingly common, the lawsuits in both cases were filed after the transactions had closed. The directors thus did not have the opportunity to respond to the lawsuits by amending or supplementing the prior disclosures. The cases demonstrate the need, before stockholder action (such as a vote or a tender) is taken, for directors and companies to make proper disclosure to stockholders so that the directors can obtain the benefit of the business judgment rule and end litigation at an early stage.

Morrison v. Berry (The Fresh Market)

In Morrison v. Berry (Del. July 9, 2018), the company had agreed to be acquired by a private equity firm in a transaction in which the company’s founder had agreed with the acquirer to roll over his existing equity stake into shares of the acquirer’s entity, rather than selling his shares for cash along with the other stockholders. The company issued a Schedule 14D-9 with the board of directors’ recommendation that stockholders accept the tender offer. After the acquisition closed, a plaintiff shareholder filed suit against the directors for breaches of their fiduciary duties. The Court of Chancery, after reviewing the company’s disclosures, found that the transaction was “an exemplary case of the utility of the ratification doctrine, as set forth in Corwin.”

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary.

To be included, a decision must:

1. 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

2. (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 exclusively 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.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

Case for Discussion: In Morrison v. Berry (aka The Fresh Market), Delaware Supreme Court Reverses Dismissal of Claim Against Directors and Emphasizes Duty to Make Proper Disclosures to Stockholders

A pair of recent decisions from the Delaware Supreme Court in connection with completed acquisitions of public companies emphasizes the importance of providing, before closing, proper disclosures to stockholders in order to defend directors, after closing, from stockholder claims.

In both cases, the Court of Chancery had relied on the Corwin doctrine — which gives directors the benefit of the business judgment rule in most cases when a transaction has been ratified by a fully informed and uncoerced majority of disinterested stockholders — to dismiss stockholder claims that directors breached their fiduciary duties. In both cases, the Supreme Court reversed, finding that the disclosures made to stockholders had omitted material information or had been materially misleading. According to the Supreme Court, the Corwin doctrine must be “carefully” applied, given its potentially dispositive impact, and cannot be supported by “partial and elliptical disclosures.”

As has become increasingly common, the lawsuits in both cases were filed after the transactions had closed. The directors thus did not have the opportunity to respond to the lawsuits by amending or supplementing the prior disclosures. The cases demonstrate the need, before stockholder action (such as a vote or a tender) is taken, for directors and companies to make proper disclosure to stockholders so that the directors can obtain the benefit of the business judgment rule and end litigation at an early stage.

Morrison v. Berry (The Fresh Market)

In Morrison v. Berry (Del. July 9, 2018), the company had agreed to be acquired by a private equity firm in a transaction in which the company’s founder had agreed with the acquirer to roll over his existing equity stake into shares of the acquirer’s entity, rather than selling his shares for cash along with the other stockholders. The company issued a Schedule 14D-9 with the board of directors’ recommendation that stockholders accept the tender offer. After the acquisition closed, a plaintiff shareholder filed suit against the directors for breaches of their fiduciary duties. The Court of Chancery, after reviewing the company’s disclosures, found that the transaction was “an exemplary case of the utility of the ratification doctrine, as set forth in Corwin.”

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary.

To be included, a decision must:

1. 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

2. (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 exclusively 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.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

Case for Discussion: In Morrison v. Berry (aka The Fresh Market), Delaware Supreme Court Reverses Dismissal of Claim Against Directors and Emphasizes Duty to Make Proper Disclosures to Stockholders

A pair of recent decisions from the Delaware Supreme Court in connection with completed acquisitions of public companies emphasizes the importance of providing, before closing, proper disclosures to stockholders in order to defend directors, after closing, from stockholder claims.

In both cases, the Court of Chancery had relied on the Corwin doctrine — which gives directors the benefit of the business judgment rule in most cases when a transaction has been ratified by a fully informed and uncoerced majority of disinterested stockholders — to dismiss stockholder claims that directors breached their fiduciary duties. In both cases, the Supreme Court reversed, finding that the disclosures made to stockholders had omitted material information or had been materially misleading. According to the Supreme Court, the Corwin doctrine must be “carefully” applied, given its potentially dispositive impact, and cannot be supported by “partial and elliptical disclosures.”

As has become increasingly common, the lawsuits in both cases were filed after the transactions had closed. The directors thus did not have the opportunity to respond to the lawsuits by amending or supplementing the prior disclosures. The cases demonstrate the need, before stockholder action (such as a vote or a tender) is taken, for directors and companies to make proper disclosure to stockholders so that the directors can obtain the benefit of the business judgment rule and end litigation at an early stage.

Morrison v. Berry (The Fresh Market)

In Morrison v. Berry (Del. July 9, 2018), the company had agreed to be acquired by a private equity firm in a transaction in which the company’s founder had agreed with the acquirer to roll over his existing equity stake into shares of the acquirer’s entity, rather than selling his shares for cash along with the other stockholders. The company issued a Schedule 14D-9 with the board of directors’ recommendation that stockholders accept the tender offer. After the acquisition closed, a plaintiff shareholder filed suit against the directors for breaches of their fiduciary duties. The Court of Chancery, after reviewing the company’s disclosures, found that the transaction was “an exemplary case of the utility of the ratification doctrine, as set forth in Corwin.”

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary.

To be included, a decision must:

1. 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

2. (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 exclusively 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.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.
• the 14D-9 stated that the company had formed a strategic transaction committee because it "could become" subject to shareholder pressure, but it did not disclose that the company had already become subject to shareholder pressure.

The Chancery Court had found that disclosure of the founder's intent to sell his shares would not have made stockholders less likely to tender. The Supreme Court, however, emphasized, "[t]hat hat is not the test." The Supreme Court reiterated that "[o]mitted information is material if there is a substantial likelihood that a reasonable stockholder would have considered the omitted information important when deciding whether to tender her shares or seek appraisal." The definition includes facts that a stockholder would "generally want to know in making a decision, regardless of whether it actually sways a stockholder one way or the other, as a single piece of information rarely drives a stockholder's vote."

Appel v. Berkman (Diamond Resorts International)

The Morrison decision reiterates some of the themes raised by the Delaware Supreme Court earlier this year in Appel v. Berkman (180 A.3d 1055, Del. Feb. 20, 2018). In that case, the board of directors had recommended that stockholders tender their shares in a negotiated tender offer. The company's Schedule 14D-9 disclosed that the company's founder, largest stockholder, and chairman had abstained from the board vote, but it did not disclose that he had abstained because he was disappointed in the price and in company management for not having run the business in a manner that would command a higher price and he believed it was not the right time to sell the company. Two months after the deal closed, the plaintiff, a stockholder filed suit.

The Supreme Court held that the founder's reason for abstaining from the board vote was a material fact that should have been disclosed. The Supreme Court declined to find that a director's reasons for abstaining or dissenting must always be disclosed, but found that courts should consider whether such disclosure is required to ensure that other disclosures do not present a materially misleading picture. Ultimate, the Supreme Court held that, in that case, "the 14D 9’s representation to stockholders that they would receive a fair price in the merger was materially misleading without an additional simultaneous, tempering disclosure' that [the founder] believed that this was 'a bad time to sell' and had expressed the reasons for that view to the board."

Key Takeaway

In many respects, these cases follow a familiar fact pattern: a transaction is announced, a shareholder files suit, and the company's disclosures are alleged to be inadequate based on internal documents produced by the company. In past cases, the litigation routinely began before the transaction closed. Accordingly, before the stockholder vote or tender actually took place, the company could often have disclosed additional information as a potential avenue for settling the case, thereby preserving the transaction and ameliorating the risk of director liability. However, over the past few years, Delaware courts have pushed back against the profusion of shareholder litigation in acquisitions. Partly as a result of that push, those stockholder suits that are being filed increasingly are being filed after the transaction closes, eliminating the potential response of making additional disclosures.

Transacting parties and their directors, in appropriate cases, can seek the protection of the Corwin doctrine and limit their exposure to liability in this evolving landscape by making proper disclosures. Nonetheless, the Delaware Supreme Court continues to signal that these protections come at a price: complete disclosure, before the stockholders act, of the material information in the transaction.
The Market Trends Subcommittee had a packed house in Orlando to hear presentations on the Subcommittee’s recently released Canadian Public Target Deal Points Study, a sneak-peak at Practical Law’s bi-annual study on Reverse-Break-up Fees and Specific Performance Remedies, and a Market Update by Houlihan Lokey focusing on Earnouts and CVRs in recent healthcare transactions.

In Austin, our meeting will start off with a presentation on the hot-off-the-presses European Private Target Deal Points Study. For those of you unfamiliar with this study, just the collection of the sample set of agreements alone is a herculean task as these agreements are not generally publically filed. In addition to surveying relevant European deal points, the study also compares the European study results to the U.S. Deal Points Studies so that readers can compare and contrast the trends between the European and U.S. M&A markets. We look forward to hearing some of the highlights of the study in Austin, and tip our hats to Co-chairs Reid Feldman, Jan-Willem van Rooij, Yan Pecoraro and Bob Calmes and the rest of their working group on completing this study.

We will also provide an update on the status of our other studies, and as always, if you would like to volunteer for any of the studies – we would love to have your involvement. Working on a Deal Points Study is a great way to get more involved in the M&A Committee and meet other members of the Committee.

During the Austin meeting’s Market Update by Houlihan Lokey, Jen Müller and Youmna Salameh will present on the hot topic of dual class stock – including the financial, valuation and potential transaction-related considerations associated with dual-class common stock structures, as well as other situations involving controlling stockholders.

Lastly, we will start to tackle “What’s Market” among our Subcommittee members by surveying the meeting attendees on what they are seeing in their own practices. In order to make this segment really useful, if you have ever read a slide in a Deal Point Study and thought that it seemed off market for your practice, please email Rita O’Neill (oneillr@sullcrom.com) and Kevin Kyte (kkyte@stikeman.com) – we would love to hear from you! We will then use the submissions to debate and survey the crowd.

We look forward to seeing you in Austin!

RITA O’NEILL, CHAIR
KEVIN KYTE, VICE-CHAIR

The Private Equity M&A Joint Subcommittee met at the Business Loan Section’s spring meeting in Orlando on March 28. We commenced with our “Recent Development” series with a panel discussion on “Trump Tax Reform and Private Equity M&A.” I was joined on the panel by an investment banker, Rachel Regenstein (Houlihan Lokey, New York, New York), a U.S. tax lawyer, Cristin Keane (Carlton Fields, Tampa, Florida), and a Canadian tax lawyer, John Lorito (Stikeman Elliot, Toronto, Ontario), to discuss how the recent changes to the U.S. tax code are effecting and might affect Private Equity M&A and our practices. Then, as part of our “The Experts Speaks” series, Glenn West (Weil, Gotshal & Manges LLP, Dallas, Texas) discussed “Private Equity Deal Issues that keep Recurring – Why are we not learning the lessons from Caselaw.” Finally, to end our meeting, Jonathan Cardenas, will introduce the new Private Equity and Venture Capital Dictionary Taskforce.

The Private Equity M&A Subcommittee will meet next on Friday, September 14 at 10:30 am local time, in Austin, as part of the Business Law Section’s Annual Meeting. We are planning two presentations for our meeting. First, as part of our “Recent Developments” series, I will be chairing a panel with The Honorable Justice Collins J. Seitz of the Delaware Supreme Court, Leigh Walton, a partner at Bass Berry & Sims in Nashville, Tennessee and a former chair of the Mergers and Acquisitions Committee, and Pamela Millard, a partner at the Wilmington, Delaware law firm of Potter Anderson Corroon LLP. The program will be entitled “Negotiating the Governing Law Clause post Eagle Force.” The panel will discuss the Delaware Supreme Court’s decision in Eagle Force Holdings, LLC v. Campbell (Del. 2018) and how it might and should effect Private Equity M&A lawyers in negotiating governing law clauses in acquisition agreements. Then, as part of our “The Experts Speak” series, a panel that will be moderated by Matt Sachse, a Managing Director of Page Mill Partners in Palo Alto, California, and will also include Margaux Knee, Assistant General Counsel at Protocol Labs, Daniel Goldman, a partner of Gunderson Dettmer in New York, New York and Todd Bissett, a partner in the Kitchener-Waterloo, Ontario, office of Miller Thomson, will discuss “The Movement of Private Equity into Technology.” It should be an informative 90 minutes.

As I keep sincerely saying, but to little effect, I, along with my Vice-chairs – Mireille Fontaine (BLF, Montreal, Quebec) and Samantha Horn (Stikeman Elliot, Toronto, Ontario) – continually seek YOUR feedback as to the meetings and the Joint Subcommittee, either by talking to one of us in Austin or reaching out to one of us afterwards. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them. And, as I’ve said before, if you don’t know me and you are at the Austin meeting, please feel free to come by and introduce yourself.

I look forward to seeing many of you in Austin on Friday, September 14 at 10:30 am local time. If you are unable to be there, please feel free to dial-in and listen using the instructions on page 26 in Deal Points.

DAVID ALBIN, CHAIR
MIREILLE FONTAINE, VICE-CHAIR
SAMANTHA HORN, VICE-CHAIR
The Technology in M&A Subcommittee met on Friday, April 13, at the Spring Meeting of the Business Law Section in Orlando. That meeting primarily comprised an overview of our Subcommittee’s first project (a directory of technologies currently being used by M&A practitioners, which Will Norton of SimplyAgree is helping the subcommittee to develop), with presentations from four of our members on the key features of four types of technologies used in M&A namely document negotiation tools, with particular reference to version control systems and document/task tracking tools (Haley Altman of Doxly), document integrity checking tools (Tasha Hailey Hutchins of Thomson Reuters Practical Law, who demonstrated this feature using the Drafting Assistant product), automated diligence (Steve Obenski of Kira) and closing management (Will Norton of SimplyAgree).

We have circulated an updated copy of the latest version of the directory to subcommittee members ahead of our forthcoming meeting in Austin. The directory is also available on our subcommittee webpage (https://apps.americanbar.org/dch/committee.cfm?com=CL560026), but because it is a work in progress it is only available to subcommittee members (you can join through the “Join a Committee” button on the Section’s main “Committees” page).

Tom and I would again like to thank Will for all his hard work in getting the directory to its current state and also to thank those members of our subcommittee who have given us initial comments on it. If you are aware of additional technologies not listed in the directory, please let us know. Please also let us know if you have practical experience with any of these technologies and, if so, whether you would be interested in sharing your experiences with subcommittee members in connection with our planned development of a series of case studies on these technologies or by demonstrating them at a future meeting.

Going forward we have four further projects, for which we are seeking volunteers and, in some cases, leaders:

- The ethical issues that arise when using different types of technology in M&A. This project is being led by Matt Kittay (Fox Rothschild, New York, New York) who will lead a discussion on it at our meeting in Austin.
- Crowdsourcing data from our members (e.g. by polling) on the M&A technologies they are using and what they think of them.
- A project for the wider M&A Committee, considering how all of our subcommittees and task forces might communicate better with our members.
- Producing a series of case studies on technologies being used in M&A. Kevin Kyte (Stikeman Elliott, Montreal, Quebec) has produced the first of these on the subject of document assembly technology (which appears on page 12 of this issue of Deal Points) and he will give a short presentation on it at our meeting in Austin.

Please join us at our forthcoming meeting, which will take place from 3:30 pm – 5:00 pm on Friday, September 14 at the Annual Meeting of the Business Law Section in Austin. At that meeting, we will report on the status of our directory project, discuss our other projects and hear the following presentations:

- Matt Kittay of Fox Rothschild will lead a discussion on ethical issues that arise when using different types of technology in M&A, with participation from Haley Altman of Doxly, Steve Obenski of Kira and James Walker of Richards Kibbe & Orbe.
- Brooke Goodlett of Wilson Sonsini Goodrich & Rosati will give a live demonstration of cap table software.
- Kevin Kyte of Stikeman Elliott will overview his case study on document assembly technology (which appears on page 12 of this issue of Deal Points).

If you use a type of technology that you'd like to demonstrate at a future meeting (or to produce a case study on – see above) please let us know.

Being a member of our subcommittee is the only way to ensure that you receive updates on our Technology in M&A directory and other relevant materials from our subcommittee. If you are not already a member we warmly invite and encourage you to join, through the “Join a Committee” button on the Section's main “Committees” page.

If you have ideas for how we might take the subcommittee forward, please share them with us. Please come to our forthcoming meeting in Austin and if you can’t do that please email Vice-chair Tom Romer (romert@gtlaw.com), M&A Directory Project Leader Will Norton (will@simplyagree.com), Ethics in M&A Technology Project Leader Matt Kittay (mkittay@foxrothschild.com) or me (daniel.rosenberg@crsblaw.com).
Continuing the tradition of profiling new members of the M&A Committee, in this issue of Deal People I’m introducing Diego Gómez-Cornejo.

Diego is partner at the Dallas office of McDermott Will & Emery LLP, where he focuses his practice on complex domestic and cross-border business transactions, with an emphasis on M&A, joint ventures, and other strategic alliances. Diego’s initiation to M&A Committee meetings was at the Committee’s stand-alone meeting in Laguna Beach in January 2018. Not a bad way to start!

Since law school (Southern Methodist University Dedman School of Law), Diego has actively volunteered on immigration matters, primarily through the Human Rights Initiative of North Texas. Most of the matters on which he has been involved were asylum or VAWA cases. Diego especially enjoys helping people from Latin America given his familiarity with the culture and fluency in Spanish.

Diego’s passion for assisting with immigration cases stems from his own immigration story. He is originally from Lima, Peru, where he was born and raised (except for a short stint between ages 2 and 6, when he lived in Oregon and South Carolina with his parents). Diego did most of his schooling in Peru, and he immigrated to the United States in early 2012 due to Peru’s struggle with political and economic unrest at the time. In the 16 years since his arrival in the U.S., Diego has held multiple visas, so he is familiar with the process.

Diego also is actively involved with the Texas Minority Counsel Program (TMCP). The TMCP is a client development, networking, and CLE event for diverse attorneys in Texas, which provides opportunities for minority, women and LGBT lawyers to network with corporations and governmental organizations while also obtaining valuable CLE credit. It is the State Bar of Texas Office of Minority Affairs’ annual flagship program. Diego has been involved for the past five years (either attending or presenting), and he has been on the TMCP Steering Committee for the past two years.

Diego was an avid skateboarder for most of his “youth” (early teens to mid-twenties). He still owns a skateboard that he uses sporadically. In the past few years, Diego started gathering “skateboard art” (essentially paintings or prints made on skate decks). If you’ve visited his office, you will have seen the Jean-Michel Basquiat painting from the MOMA collection printed on five skate decks hung in his office. More recently, Diego picked up soccer (or fútbol). He has been playing either in indoor leagues or outdoor pickup games on the weekends. He and a few friends started a Facebook group to help coordinate games about seven years ago. The group now has close to 500 members (not all of whom come play at once).

I encourage you to welcome Diego to the Committee when you see him in Austin!
RITA-ANNE O’NEILL

Rita O’Neill is a partner in the Los Angeles office of Sullivan & Cromwell LLP (S&C) and serves as co-head of S&C’s Global Private Equity Group. An accomplished dealmaker and go-to adviser for some of her clients’ most innovative transactions, Rita has a broad-based practice that focuses on high-stakes public and private M&A transactions.

Rita pursued law as a second career, and she started attending M&A Committee meetings soon after she became a partner at S&C in 2013. In the five years since Rita became actively involved on the Committee, she has made significant contributions, both with Committee work and Committee fun! Currently, she is Vice-chair of the Committee’s Women in M&A Task Force and Chair of the M&A Market Trends Subcommittee, and Rita was Chair of the Committee’s inaugural Deal Points Study on Carve-out Transactions.

If you know Rita, you know that she is passionate about doing deals. Her number one passion outside of doing deals is the work that she does with Jen Muller (Deal People, Spring 2014) to attract, retain and advance Women in M&A. Through her work on Women in M&A initiatives (including the ABA Women in M&A Task Force and a national networking initiative that Jen and she started for senior female dealmakers), Rita gets to make an impact on a cause that is important to her, while meeting great people at the same time. She observed: “It’s funny, because people often talk about ‘work-life balance’, but that implies that work and life are binary and at odds – work is negative and draining and life is positive and recharging (I did not make that concept up – but no one knows who to attribute it to). Instead, if you are doing work that you love, then you actually enjoy spending time out of the office ‘working’.”

When not doing deals or supporting and promoting women in M&A, you’re most likely to find Rita in one of three places: On a golf course, walking her dogs, or at a soccer game. An avid soccer enthusiast, Rita has season’s tickets for the LA Galaxy and the Los Angeles Football Club. Golf is a recent passion of Rita’s, and one which she particularly enjoys because, on the golf course, she doesn’t think to check her emails.

Rita’s passion for her three dogs runs deep; they are “her life” and she spends as much time with them as her busy practice permits. And consistent with that theme, Rita is passionate about animal rights and is an active provider of pro bono legal services with a particular focus on animal rescue projects.

Say hello to Rita when you see her in Austin!

About Deal People

Deal People is a feature in Deal Points that highlights members of the M&A Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

If you have pictures from Committee meetings that you would like to suggest for inclusion in a future issue of Deal Points, please send them to me.

John F Clifford    |    McMillan LLP    |    Toronto, Canada    |    john.clifford@mcmillan.ca
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
FAIRMONT AUSTIN & THE AUSTIN CONVENTION CENTER | AUSTIN, TEXAS, USA | SEPTEMBER 13-15, 2018

Please note that times listed are CENTRAL TIME and dial in numbers are meeting-room specific. Please be conscientious of start and end times. Leader pin numbers will be distributed to chairs on site.

<table>
<thead>
<tr>
<th>Meeting Room</th>
<th>Toll-Free US Number</th>
<th>International Number</th>
<th>Conference Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manchester Ballroom AB, 5th Floor</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>4027564183</td>
</tr>
<tr>
<td>Sunflower, 4th Floor</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>3199473460</td>
</tr>
<tr>
<td>Primrose, 4th Floor</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>1856339215</td>
</tr>
<tr>
<td>Poppy, 4th Floor</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>7465900121</td>
</tr>
</tbody>
</table>

Friday, September 14, 2018

9:00 am – 10:30 am
M&A Jurisprudence Subcommittee
Chair: Michael O’Bryan
Manchester Ballroom AB, 5th Floor

10:30 am - 12:00 pm
Private Equity M&A Joint Subcommittee
Chair: David I. Albin
Manchester Ballroom AB, 5th Floor

1:00 pm - 2:00 pm
Short Form Agreements Joint Task Force
Co-chairs: Eric K. Graben and Jason Balog
Poppy, 4th Floor

1:00 pm - 2:00 pm
Legal Project Management Subcommittee
Co-chairs: Byron S. Kalogerou and Dennis J. White
Sunflower, 4th Floor

1:00 pm - 2:30 pm
Acquisition of Public Companies Subcommittee
Chair: Jennifer F. Fitchen
Manchester Ballroom AB, 5th Floor

2:30 pm - 3:30 pm
Task Force on Women in M&A
Chair: Jennifer S. Muller
Manchester Ballroom AB, 5th Floor

3:30 pm - 5:00 pm
Technology in M&A Subcommittee
Chair: Daniel P. Rosenberg
Manchester Ballroom AB, 5th Floor

5:00 pm - 5:30 pm
Subcommittee and Task Force Chairs
Chair: Scott T. Whittaker
Manchester Ballroom AB, 5th Floor

5:30 pm - 6:30 pm
Women in Law Reception
Co-chairs: Jennifer S. Muller and Christine W. Young
Manchester Ballroom G, 5th Floor
### Saturday, September 15, 2018

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 am – 10:30 am</td>
<td>International M&amp;A Subcommittee</td>
<td>Manchester Ballroom AB, 5th Floor</td>
</tr>
<tr>
<td>10:30 am – 12:00 pm</td>
<td>Market Trends Subcommittee</td>
<td>Manchester Ballroom AB, 5th Floor</td>
</tr>
<tr>
<td>1:00 pm – 2:00 pm</td>
<td>M&amp;A Litigation Joint Task Force</td>
<td>Primrose, 4th Floor</td>
</tr>
<tr>
<td>1:00 pm – 2:00 pm</td>
<td>Task Force on Private Company Model Merger Agreement</td>
<td>Manchester Ballroom AB, 5th Floor</td>
</tr>
<tr>
<td>2:00 pm – 3:00 pm</td>
<td>Financial Advisor Task Force</td>
<td>Manchester Ballroom AB, 5th Floor</td>
</tr>
<tr>
<td>3:00 pm – 5:00 pm</td>
<td>Mergers and Acquisitions Full Committee Meeting</td>
<td>Manchester Ballroom AB, 5th Floor</td>
</tr>
<tr>
<td>7:00 pm – 10:00 pm</td>
<td>Mergers and Acquisitions Committee Dinner</td>
<td>Green Pastures</td>
</tr>
</tbody>
</table>

**Ticket Required**

---

### Programs

**Friday September 14, 2018**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>3:30 pm – 5:00 pm</td>
<td>Successor Liability in Asset Acquisition Transactions</td>
<td>Indigo, 4th Floor</td>
</tr>
</tbody>
</table>

**Saturday September 15, 2018**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:30 am – 10:00 am</td>
<td>The M&amp;A Carveout: The Perils and Pitfalls of Partial Divestitures</td>
<td>Manchester Ballroom C, 5th Floor</td>
</tr>
<tr>
<td>10:30 am – 12:30 pm</td>
<td>The World’s Most Contentious M&amp;A Clauses: A Guide for the Negotiator</td>
<td>Manchester Ballroom C, 5th Floor</td>
</tr>
</tbody>
</table>

**Chair: Franziska J. Ruf**

**Chair: Claudia K. Simon**

**Co-chairs: Yvette R. Austin Smith and Michael A. Pittenger**

**Co-chairs: Melissa A. DiVincenzo and Amy L. Simmerman**

**Chair: Thomas B. Davey**

**Chair: Scott T. Whittaker**

**Co-chairs: Yvette R. Austin Smith and Michael A. Pittenger**

**Co-chairs: Melissa A. DiVincenzo and Amy L. Simmerman**

**Chair: Thomas B. Davey**

**Chair: Scott T. Whittaker**

**Co-chairs: Yvette R. Austin Smith and Michael A. Pittenger**

**Co-chairs: Melissa A. DiVincenzo and Amy L. Simmerman**

**Chair: Thomas B. Davey**

**Chair: Scott T. Whittaker**

**Co-chairs: Yvette R. Austin Smith and Michael A. Pittenger**

**Co-chairs: Melissa A. DiVincenzo and Amy L. Simmerman**

**Chair: Thomas B. Davey**

**Chair: Scott T. Whittaker**

---
The M&A Committee thanks our sponsors.

DUFF & PHELPS

J.P. Morgan
Duff & Phelps is the global advisor that protects, restores and maximizes value for clients in the areas of valuation, corporate finance, investigations, disputes, cyber security, compliance and regulatory matters and other governance-related issues. We work with clients across diverse sectors and through our Kroll division, mitigate risk to assets, operations and people.

1. Published in Thomson Reuters’ “Full Year 2016 Mergers & Acquisitions Review.”

Duff & Phelps is a trade name for Duff & Phelps, LLC and its affiliates. M&A advisory, capital raising and secondary market advisory services in the United States are provided by Duff & Phelps Securities, LLC. Member FINRA/SIPC.

Rethink M&A shareholder payments

Experience the Paying Agent Portal

We’re here to support your global escrow needs, including holdbacks, good faith deposits, closing agent & paying agent services

jpmorgan.com/escrow

© 2018 JPMorgan Chase & Co. All rights reserved.
resulting in a higher working capital balance. Further, a target company’s historical estimation and judgment practices may be vague and poorly documented. Accordingly, buyers prefer to rely on the GAAP safeguard for accounts receivable and the corresponding allowance for doubtful accounts.

All else being equal, however, a seller will be concerned that its estimations and judgments may be supplanted after-the-fact by a buyer’s estimations and judgments based on the buyer’s perceived GAAP non-compliance of the target company’s pre-closing accounting practices. Even if facts and circumstances have changed as of the closing date in a manner that requires a change in accounting relative to the target company’s historical estimations, a seller will not want open-ended exposure to a buyer’s potentially very conservative allowance estimate (GAAP allows a range of possible outcomes). A seller will be concerned about comparing apples to oranges at its expense.

A possible customized solution would be to retreat from the judgments and estimations involved when applying either GAAP or the target company’s historical accounting practices in favor of a contractually agreed upon mechanical calculation. For example, the parties may include a provision (and example calculation) that mandates the quantification of the allowance for doubtful accounts based on increasing percentages across accounts receivable aging brackets.

- Example:

  “The allowance for doubtful accounts shall be calculated as the sum of (i) 25% multiplied by the part of the gross accounts receivable balance that is older than 30 days but not older than 60 days, (ii) 50% multiplied by the part of the gross accounts receivable balance that is older than 60 days but not older than 90 days, (iii) 75% multiplied by the part of the gross accounts receivable balance that is older than 90 days but not older than 120 days, and (iv) 100% multiplied by the part of the gross accounts receivable balance that is older than 120 days.”

Of course, a broad range of potential customizations and negotiation points exists when electing this solution. For example, the parties likely will negotiate the allowance percentages for each aging bracket as well as the aging brackets themselves. The parties may also want to customize the provision by including, for example, a cap on the allowance for doubtful accounts and by specifying how write-offs factor into the calculation.

An analogous approach—utilizing an agreed upon mechanical calculation—may also be negotiated for other accounts that exhibit similar point-in-time estimation issues, such as the inventory allowance. The inventory allowance is used to record the estimated portion of the cost of inventory that exceeds the net realizable value or market value of the inventory reflected on the balance sheet of the target company.

A myriad of other solutions occurs in practice. For example, the allowance for doubtful accounts amount may be frozen (without increase or decrease, or one direction only) for purposes of calculating closing working capital at the amount included in the latest balance sheet that is included in the target company’s financial statement representations and warranties, except for adjustments for actual collections and write-offs following the date of the latest balance sheet. This approach provides rough justice to both a buyer and a seller by not accounting for the passage of time and changes in collectability of accounts receivable from the date of the latest balance sheet to the closing date, but is easily applied and assumes that the allowance for doubtful accounts and accounts receivable remain relatively stable over time. Assuming that post-closing events are an acceptable basis for consideration, the parties also may agree that, utilizing actual post-closing experience, the buyer would receive a repayment from the seller for any accounts receivable that remain outstanding after, for example, the 120th day following the closing date (assuming that the parties can agree on the collection efforts required by the buyer during the post-closing period), and the seller then may be entitled to seek to collect such stale accounts receivable for the seller’s benefit (assuming that the buyer does not mind the seller pursuing collection from the buyer’s continuing customers).

Notably, questions regarding the impact of post-closing events on the determination of the closing working capital—as provided for explicitly in the example in the preceding paragraph—exist more broadly for accounting estimates that are not replaced by another arrangement. This issue of determining the extent to which post-closing events may be considered when performing accounting estimates is an issue that the parties commonly grapple with. For example, should post-closing, actual collection information impact the allowance for doubtful accounts as of the closing date in the absence of a specific provision? And if so, through which date should those collections be considered?

GAAP includes guidance on the consideration of subsequent events for purposes of preparing financial statements and distinguishes between types of events. That guidance, however, is tied to the date the financial statements are available to be issued (for non-SEC filers). Assuming the parties are willing to rely on GAAP for purposes of its subsequent event guidance, they could contractually agree to an equivalent date to mitigate post-closing disagreements.

Additional Mitigation Options and Overriding Provisions

In addition to the above approaches, there are a variety of other options to deal with potentially problematic working capital accounts. The parties may afford special treatment to specific items, either excluding particularly problematic items from the transaction economics altogether or excluding items from working capital and relying on other provisions such as representations and warranties and indemnification rights for breaches thereof or covenants among the parties (e.g., the tax and indemnification provisions addressing the allocation of pre- and post-closing taxes between the buyer and the seller rather than addressing taxes in part via the working capital adjustment).

In doing so, the parties should of course be mindful of contractual gaps and overlap, differences between provisions, and potential unintended consequences, avoiding the over- or under-inclusion of the effects of working capital accounts in the determination of the purchase price and components thereof and also in the determination of indemnified losses. Importantly, any departures from the overall working capital adjustment mechanism for specific working capital accounts also should be considered when negotiating the target working capital.

In addition to addressing specific accounts, the parties may also use overriding provisions to mitigate potential working capital issues, including the following:
• The parties may define global working capital terms such as GAAP, which is not static and may change between the date on which target working capital is determined and the closing date, to be as of a specific date so that the same GAAP applies to the determination of target working capital and closing working capital.

• The parties may establish a post-closing true-up process in the purchase agreement that can be objectively applied and which cannot be unduly sabotaged or delayed by one of the parties through, for example, one party’s refusal to agree to and retain a neutral accountant or meet a specified milestone date (e.g., the date on which a buyer is required to deliver its post-closing working capital analysis). This issue could arise if the purchase agreement simply leaves it to the parties to mutually agree (without an objective process for doing so) to a neutral accountant if and when actually needed during the post-closing working capital true-up process, often at a time when the relationship has soured. Or, in respect of the failure of a party to meet an agreed milestone, this issue could arise if the parties remain silent as to the effect of such a breach of contract (which is commonly the case for a buyer’s failure to timely transmit its proposed final closing working capital statement following the closing), the amount of contractual damages potentially being difficult to determine and the cost of enforcement being potentially prohibitive.

• The parties may agree to a contractual cap on the post-closing adjustment or utilize a working capital range to only adjust the purchase price for working capital if closing working capital exceeds or falls below target working capital by a specified percentage.

We have highlighted some commonly encountered, often complex, problems with working capital true-ups and possible strategies that parties to a purchase agreement may consider to mitigate potential post-closing working capital disputes. In evaluating the options that may be implemented, if any, the parties should of course, consider the facts and circumstances of the transaction at issue. In some instances, the working capital and related exposure can be a very large component of purchase price, and the additional effort and expense associated with negotiating and incorporating customized solutions in the purchase agreement, via the coordinated efforts of the parties and their respective accountants and legal counsel, may well be worth it.

About the Authors:

A. Vincent Biemans is a managing director of Berkeley Research Group, LLC, where he assists U.S. and European buyers and sellers with their M&A disputes both as a (party-retained) advisor and as a (jointly retained) neutral accountant. He co-authored the book M&A Disputes: A Professional Guide to Accounting Arbitrations (Wiley 2017).

P. Gregory Hidalgo is a partner at Katten Muchin Rosenman, LLP, where he counsels entrepreneurs, corporate governance and other corporate-related matters. He regularly utilizes his financial experience as a former certified public accountant with a Big 4 accounting firm when counseling clients.
Overall implications

The Government expects there to be around 200 notifications each year, but anticipates it will be able to screen out around half of those as not raising concerns. Of those cases called in for a full assessment (either following notification or on the Government’s own initiative), the Government expects about half will require remedies.

These numbers are significant, particularly when compared with the total number of cases reviewed by the CMA each year under the UK merger control rules (currently around 60), albeit on competition grounds, and the total number of national security interventions by the Government under those rules in the last year (one). Accordingly they will represent a significant increase in Government intervention in inward investment activity against a backdrop of the UK’s reputation as one of the most open economies in the world, a reputation which the Government is keen to maintain as Brexit approaches while balancing the openness and attractiveness of the UK as a destination for inward investment against the need to protect national security. Although as indicated above the new regime will apply to a much wider range of transactions than the UK merger control rules, it is unclear how the Government has formulated its estimates.

What does appear clear is that those looking to make investments in the UK (or in non-UK entities or assets with a connection to the UK) will need to consider the new rules carefully (once they are in force) in formulating their acquisition or other investment strategies. However it also appears clear that in practice these new rules should be of less concern to inward investors from countries that have good relations with the UK, as compared with those from ‘hostile states’ or ‘hostile actors.’