Tender Offers: The New Paradigm and SEC M&A Updates

Chairs
Michael O’Bryan, Morrison & Foerster
Brian Breheny, Skadden Arps

Panelists
Rick Alexander, Morris, Nichols
Michele Anderson, SEC, Office of M&A
David King, Bank of America Merrill Lynch
Hal Leibowitz, WilmerHale

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Agenda

1. Tender Offer Basics
2. Tactics – A Banker’s View
3. Fiduciary Duty / Shopping Issues
4. State Structure Issues
5. Use in Control Shareholder Buyouts
6. Financing Issues
7. SEC Overlay (including Best Price Rule)
8. SEC M&A-Related Updates
   • Bios
   • Reference Materials
Intro

- Speakers
- Materials

Questions and Comments Invited!
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1. TENDER OFFER BASICS
Tender Offer Basics

- Offer made directly to target shareholders
  - Often used in hostile acquisitions; our focus is on negotiated deals
- 2-step structure
  1. Tender offer, to purchase any/all shares
  2. Back-end merger, to acquire shares not tendered
- Back-end merger can be done by buyer alone, without target board or stockholder vote, if buyer owns requisite portion of target shares (90% in Delaware)
  - Failure to qualify can lead to delays in closing back-end merger while going through process for shareholder meeting (proxy statement, solicitation period, etc.)
    - Result of shareholder vote, however, is not in question
- Parties must provide for interim governance, including target board membership
- Additional disclosure required (14f-1 Info Statement)
- Techniques have been developed to expedite the back-end merger; Delaware has changed its statute to reduce the threshold required in certain circumstances
Tender Offer Basics (cont.)

- Buyer obligation to purchase tendered shares is subject to substantive conditions
  - Minimum tender of 50%+ of target shares
    - Ensures buyer can control vote on back-end merger
    - Degree of dilution covered by condition open to negotiation
  - MAC and other business terms and legal terms
- Back-end merger subject to very few conditions – principally that it’s not illegal
- You generally don’t know how you’re doing until the last few days
  - Tendered shares can be withdrawn
  - Most people don’t tender until the end
- Appraisal rights available in back-end merger, but not in tender offer
- Both buyer and target have disclosure obligations (TO and 14d-9)
- Other SEC rules apply (for example, state law does not impose minimum tender period, but SEC does)
Tender Offer Basics (cont.)

The Two-Step Structure

Step 1 – Stock Acquisition

Buyer → More than 50% of Target Stockholders → Target Stock

Target → Target Stock

Merger Sub

Step 2 – Reverse Triangular Merger

Cash or Stock

Non-Tendering Target Stockholders (less than 50%) → Cash or Stock

Target (surviving corporation)

Buyer

Merger Sub (disappearing corporation)
Today’s Context

• Tender offers have been, and are, used for hostile deals, but represent an increasing portion of negotiated deals
• Buyers sometimes avoided tender offers for fear of exposure to “best price rule” (SEC Rule 14d-10) (“BPR”)
  • Earlier version of BPR required that each shareholder get the highest price paid to any other shareholder “during” a tender offer
  • Bidders feared that any extra amounts paid to target execs would be covered, triggering large damages (and court opinions varied)
• SEC amended the BPR in 2006, to clarify that it was not intended to pick up payments for employment compensation and the like
Context (cont.)

• The two-step structure poses potential issues for parties that want to finance the acquisition (e.g., private equity buyers)
  • Market pressures lead to new techniques (e.g., a dual track structure)
• Other techniques have reduced the time to close the back-end merger
Advantages and Disadvantages

• Speed, Speed, Speed
  • Ability to commence (almost) immediately
  • SEC Review
    • Likelihood of comments
    • Timing for receipt of comments
    • Impact of SEC Comments on overall timeline
  • Ability to close as soon as twenty (20) business days after commencement
    • Results in control, even if delay in closing back-end
Illustrative Timeline

1 Timetables may vary considerably. Diagram is illustrative only.
2 14D-9 is due 10 business days after commencement, but in negotiated deals is almost always mailed with offer document.
3 Tender offer can expire on 20th business day after commencement. Actual expiration and closing assume absence of regulatory delay and satisfaction of other conditions.
4 If no SEC comments, mail proxy statement at D+18.
5 If no SEC comments, hold meeting at D+40.
Advantages and Disadvantages (cont.)

• Impact on target board’s post-signing fiduciary obligations
  • Closing of tender offer vs. shareholder vote
  • Potential impact on decision by target’s board to select tender offer structure
  • Impact on potential interlopers
Advantages and Disadvantages (cont.)

- Anti-trust review
  - Timing for antitrust review
  - Potential to force second request
- Other regulatory reviews
- Facilitation of exchange offers
  - SEC allows “early commencement” of exchange offers
  - SEC also “committed” to expediting review of exchange offers, to allow them to compete with cash tender offers
- Relation to timing for cutting off target board’s fiduciary obligations/interloper risk
Advantages and Disadvantages (cont.)

- Impact on transactions requiring financing
  - Burger King Structure
    - SEC views on timing of proxy statement
    - SEC views on financing and funding conditions
- Impact on ISS review
Advantages and Disadvantages (cont.)

• Opportunities (or lack thereof) for arbs
  • Empty voting issues

• Special concerns for target companies included on stock indices
  • Some funds that seek to mirror the performance of an index may not tender (but could vote at a shareholder meeting for a one-step merger)
2. TACTICS – BANKER’S VIEW
2003-2013 YTD Delaware Public Company Transactions

100% Cash Transactions

Tender Offers as Percentage of Cash Transactions

Note: Completed Transactions. Includes unsolicited offers. Excludes self tenders.
Source: FactSet.
2003-2013 YTD Delaware Public Company Transactions
Tender Offer vs. Merger Timing (100% Cash Transactions)

Median Number of Days to Close (1)

Note: Completed Transactions. Includes unsolicited offers. Excludes self tenders.
Source: FactSet.
(1) Calculated based on calendar days from announcement to closing.
2003-2013 YTD Delaware Public Company All Cash Tender Offers and Mergers

Median Premiums: Tender Offers vs. Mergers (1)

Note: Completed Transactions. Includes unsolicited offers. Excludes self tenders. Source: FactSet.
(1) Calculated based on target’s price one day prior to acquisition.
3. FIDUCIARY DUTY AND SHOPPING ISSUES
Shopping Issues

- Revlon Principles
  - No single blueprint
  - Two-step can shorten post-signing shopping period
  - Pre-consummation period can be contractually increased
  - Fiduciary question: board must understand issue and make reasonable decision
- Morton’s (Del. Ch. 7/23/13): Majority of majority condition?
Shopping Issues (cont.)

Cases that specifically address two-step structure

• *In re Compellent Techs., Inc. Sh. Lit.* (Del. Ch. Dec. 9, 2011) (Laster)
  
  − Speed of a two-step merger helps “avoid[] any topping bids and achiev[e] certainty of closure.”
  
  − “Dell therefore proposed a two-step tender offer that would enable the transaction to close faster than a one-step merger.”

• *Forgo v. Health Grades, Inc.* (Del. Ch. June 29, 2011) (Transcript) (Strine)
  
  − As part of the litigation settlement following the preliminary injunction hearing, the tender-offer period was extended by twenty-eight days
Shopping Issues (cont.)

  - “But the board decided, as I understand it, ‘We wanted to get the 8.20 in the hands of the stockholders a couple weeks before’ – ‘three or four weeks’ or ‘six weeks before.’ ‘We knew that it would actually limit the effectiveness of the passive market check, but we assented to the demand to do the tender offer.’”
  - “[T]he board, even between transactional alternatives, didn’t really press for the one that lengthened the period of time.”
Mechanics for Shopping

- Some targets have negotiated for longer tender offer periods or for right to cause buyer to extend tender offer, to implement a go-shop or to allow for more effective passive market check
4. STATE STRUCTURE ISSUES
State Structure Issues

- Closing the Back-End Merger
- Impact of Anti-Takeover Rules
Evolving Merger Votes Under Delaware Law

• Before 8/1/13
  • Long-form: majority of outstanding shares
  • Short-form: 90% of each voting class
  • Top-up: Percentage necessary to “top up” to 90% without running out of shares

• Sec. 251(h): Medium Form Mergers – for agreements after 8/1/13
  • Addresses “clunkiness” of top up option and lingering appraisal issues
  • Addresses arbitrariness of ability to top up based on amount of overhang
  • Win/Win: increases flexibility for all parties
Section 251(h) Requirements

1. Opt-in
2. Effect merger as soon as practicable following tender closing
3. Tender for “any and all”
4. Following consummation, own enough shares to approve a long-form merger
5. No party to merger agreement is an interested stockholder under Section 203 when board approves agreement
6. Equal treatment
Sections 251(h) and 203

- “Agreement, arrangement or understanding”
- Support agreements
- Rollover agreements
- The need for early approval under Section 203
- Options under Section 251(h)
  - “Own” less than 15%
  - Determine early approval is not required
## 251 (h): Impact on Buyers and Sellers

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<th>Impact</th>
<th>Key Benefits</th>
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| **Buyers** | • Avoid issues with 50% margin rules  
• Eliminates need for “Burger King” dual-track structure  
• Can offer sellers high certainty of quick close  
• Less time for interloper to emerge  
• Streamlined SEC review  
• Typically less expense | • Timing to complete marketed financing  
• Delaware “interested stockholder” rule -- 15% threshold |
| **Financial Sponsors** | • Increased probability of quick close  
• Less time for interlopers to emerge  
• Streamlined SEC review  
• Typically less expense | • Sponsors can be more competitive on timing  
• Mergers may still be preferred when regulatory “second request” risk high -- reduced interloper exposure |
| **Strategic** | • Increased probability of quick close  
• Sponsors and strategic buyers on more equal footing from timing prospective | • Potentially less time for interlopers to emerge |
| **Sellers** |  |  |
Mechanics of Back-End Merger

- To close back-end merger pursuant to Sec. 253 or 251 (as traditional short-form or new medium-form), Buyer must “own” shares
- SEC requires payment for shares (or return of shares) promptly after expiration of tender offer (Rule 14e-1(c))
  - Not “reasonably promptly” or “as promptly as practicable”
Other Ways of Getting to Short-Form

- Extend tender offer and beat the bushes
- Top-up – Acceptance, in Delaware and elsewhere; mechanics
  - Early litigation over top-up’s largely resolved, at least in Delaware
    - General validity
    - Appraisal dilution
    - Formal steps
  - Have become near-universal (96-97% of all tender offers in last several years)
    - Limited by target’s authorized shares, potential stock exchange shareholder vote requirements
      - 10-to-1 ratio required
      - Questions may remain in other states
- Subsequent Offer Periods (Rule 14d-11)
- Other Purchases
Appraisal Notice: Section 251(h)

- Section 262(d)(2)—20 day clock begins with notice that is sent after “approval”

- For Section 253, notice usually sent after merger closes

- Section 251(h) expressly provides that appraisal notice can be sent before tender closes

- Allows clear path for appraisal condition in two-step transaction
California’s 50/90 Rule

• California General Corporation Law requires the unanimous approval of all target shareholders for a cash-out merger if, prior to the merger, buyer owns more than 50% but less than 90% of target’s outstanding shares (Sec. 1101)
  • Issue in two-step merger if acquiror is not able to reach 90% or more threshold

• Potential Solutions
  • Acquirors require higher minimum tender condition (90%)
  • Top-up option
  • Closing on less than 50%, with follow-on merger (traditional)
  • Burger King structure
Control Share Statutes

- Under some states’ antitakeover statutes, shareholders, in addition to directors, must authorize the transaction in some fashion if transaction involves the issuance of shares that entitle the holder to specified percentage of voting power
5. USE IN CONTROL
SHAREHOLDER BUYOUTS
Siliconix

- *In re Siliconix Inc. Sh. Lit.* (Del. Ch. 6/21/01) (Noble)

- Stock-for-stock tender offer by majority stockholder to acquire remaining 19.6% of outstanding stock
  - that Vishay would effect a short-form merger at the same price per share following a successful tender.
  - Negotiated by a special committee of independent directors (who remained neutral on the tender),
  - Conditioned on non-waivable MOM tender,
  - With the stated *intent*

- Rejecting entire fairness review of the tender offer “unless actual coercion or disclosure violations can be shown” because the decision whether to tender is in the hands of the individual stockholders
  - i.e., the subsidiary corporation is not “the actual target of a tender” and its board “traditionally has been accorded no statutory role whatsoever with respect to a public tender offer . . . .”

- “It may seem strange that the scrutiny given to tender offer transactions is less than the scrutiny that may be given to, for example, a merger transaction . . . . From the standpoint of a Siliconix shareholder, there may be little substantive difference [between a tender offer and a long-form merger].”
Pure Resources

• *In re Pure Res., Inc., Sh. Lit.* (Del. Ch. 2002) (Strine)
• BJR to be applied to a tender offer made by a controlling stockholder only when:
  • It is “subject to a non-waivable majority of the minority tender condition”;  
  • The “controlling stockholder promises to consummate a prompt § 253 merger at the same price if it obtains more than 90% of the shares”;  
  • The “controlling stockholder has made no retributive threats”; and  
  • The controller also “permit[s] the independent directors on the board both free rein and adequate time to react.”
“Unified Standard” Suggested: Cox Commc’ns

- In re Cox Commc’ns, Inc. Sh. Lit. (Del. Ch. 2005)
  - “On a more fundamental level, I observe that Delaware law would improve the protections it offers to minority stockholders . . . by reforming and extending Lynch in modest but important ways.”
  - “The reform would be to invoke the business judgment rule standard of review when a going private merger with a controlling stockholder was effected using a process that mirrored both elements of an arms-length merger:
    1) approval by disinterested directors; and
    2) approval by disinterested stockholders.”
  - This rule would level the playing field for determining whether to use a long-form merger or a tender offer, would “giv[e] defendants the real option to get rid of [non-meritorious] cases on the pleadings,” and might increase use of MOM conditions.
  - This hypothetical alteration of Lynch would allow for unification with Siliconix and Pure if entire fairness were to apply if a special committee recommended that the minority not tender.
  - “Reform of our common law in this manner also honors our law’s traditions, by respecting the informed business judgment of disinterested directors and stockholders.”
CNX

- *In re CNX Gas Corp. Sh Lit.* (Del. Ch. 5/25/10)

  - Controller proposed a tender offer to cash out the public minority:
    - conditioned on non-waivable MOM tender;
    - commitment to effect a short-form after consummation of the tender.

  - Special Committee formed to evaluate the tender offer,
    - Authorized to review and evaluate, prepare a 14D-9 and engage legal and financial advisors—not to negotiate or consider alternatives.
    - Just before the 14D-9 was due, Committee sought a price bump, but was rebuffed, and determined to remain neutral.

  - “I apply the unified standard for reviewing controlling stockholder freeze-outs described in [Cox Communications]. Under that standard, the business judgment rule applies when a freeze-out is conditioned on both[:]

    1. the affirmative recommendation of a special committee and
    2. the approval of a majority of the unaffiliated stockholders.”

  - The opinion also questioned the effectiveness of the MOM condition (because T. Rowe Price, a 6.7% stockholder (37% of the public float), also held a stake in CONSOL) and the authority of the committee.

  - “*Pure Resources* was an evolutionary decision that raised the bar for two-step squeeze-outs. . . . *Cox Communications* rendered the *Lynch* and *Siliconix* standards coherent by explaining that the business judgment rule should apply to any freeze-out transaction that is structured to mirror both elements of an arms' length merger, *viz.* approval by disinterested directors and approval by disinterested stockholders.” Entire fairness applies if either requirement is not met.

  - No discussion of a possible entire fairness burden-shift.
Delegation of Authority to “CNX Committees”

• V.C. Laster indicates that an effective Special Committee must be provided with “authority comparable to what a board would possess in a third-party transaction” with respect to the freeze-out proposal in order to enable it “to bargain with the controller on an arms’ length basis.”

• “The CNX Gas board majority grounded its decision [not to authorize the Special Committee to negotiate or consider alternatives] on CONSOL’s unwillingness to sell its CNX Gas shares.”
  • “Given CONSOL’s position as a controlling stockholder . . . any effort to explore strategic alternatives likely would have been an exercise in futility. But that was a decision for Pipski [the independent director comprising the Special Committee] and his advisors to make.”
  • “Armed with an appropriate delegation of authority, Pipski and the creative minds at Skadden and Lazard might have devised ways to increase the Special Committee’s leverage. They might have filed litigation against CONSOL. Or they might have considered some form of rights plan.”

• V.C. Laster’s opinion certifying interlocutory review: “Even the transaction that the Pure Resources court declined to review likely would not satisfy the Cox Communications test because the controller in Pure Resources restricted the special committee’s ability to respond to the controller’s offer.”
  • (citing page 446 of Pure Resources, in which V.C. Strine discusses plaintiff’s request for entire fairness review because the board did not “giv[e] the Special Committee the power to block the Offer by, among other means, deploying a poison pill” and notes that “[t]hat argument has some analytical and normative appeal”).
CNX: Interlocutory History

- *In re CNX Gas Corp. Sh. Lit.* (Del. Ch. 7/5/10) (Laster)
  - Granting application to certify motion for a preliminary injunction, which would allow Supreme Court review of the “unified standard” because the BJR/entire fairness standard is “pivotal” in this case, the “unified standard” is unsettled, Supreme Court standards point to varying results, and there are conflicting Chancery decisions (*compare CNX with Cox Radio*).
  - “After the pleadings stage, if the Injunction Decision stands, the defendants will need to conduct discovery, retain experts, and prepare for trial with the expectation that entire fairness will govern. Absent burden-shifting, entire fairness places the burden of proof on the defendants.”
  - “It bears noting that [CNX], *Cox Communications*, and the *Pure Resources* line of cases implicitly conflict with *Lynch* by holding that a combination of protective devices can compensate sufficiently for inherent coercion to alter the standard of review.”
  - Under *CNX*, “the target board has the same role as a board of directors responding to a third-party tender offer” (i.e., relying on §141(a) to reject the Siliconix argument that there is no statutory role for a target board in a tender offer). “A controller that uses its influence over the target board to restrict [its] authority . . . affirmatively chooses to stand on both sides of the transaction, thereby triggering entire fairness review.”

- *In re CNX Gas Corp. Sh. Lit.* (Del. 7/8/10) (Holland)
  - Supreme Court refused the certified application for interlocutory review.
BlueLinx

- *Liang v. Cohen* (Del. Ch. 8/19/10) (Transcript) (Laster)
  - 55% stockholder made tender offer to acquire the remaining shares of BlueLinx Holdings for cash, with;
    - non-waivable MOM condition (excluding D’s & O’s),
    - waivable 90% condition,
    - commitment to do a short-form if Cerberus gets over 90%, and
    - special committee vested with full board authority (including power to adopt a poison pill).
  - Plaintiffs sought expedited proceedings for a motion to enjoin the tender from closing, at least until the special committee, which at that point indicated its neutrality, could complete its negotiations and recommend either for or against.
  - “This is a case that I believe is governed by the *Cox Communications* unified standard.”
  - Because the tender itself was “not conditioned on the receipt of an affirmative recommendation from the special committee” (even though all of the other requirements for BJR outlined in CNX were adhered to) “entire fairness will govern” and “meaningful postclosing damages” are available.
    - (The Court left room for the argument that the special committee’s powers, including the power to adopt a pill, should allow for grounds to get to BJR without the affirmative condition of special committee approval, but the transcript indicates this was not his inclination.)
BlueLinx (cont.)

• “Now, that has major implications for the motion to expedite.” Because real back-end damages remedies are available under a “unified standard” transaction with a controller “closing is [not] the end of the game.” Accordingly, expedition—for reasons other than disclosure issues—is less vital.

• Conversely, under BJR, “[i]f that deal closes . . . there is no remedy,” making pre-closing expedited proceedings more important.
**MFW: Applies Unified Standard to One-Step Merger**

- **MFW** (Del. Ch. 5/29/13): Applies Unified Standard to One-Step Merger
  - “Procession of transaction” conditioned of approval of committee and majority of minority vote
  - Committee is independent
  - Committee empowered to select advisors and to “say no definitively”
  - Committee meets duty of care
  - Vote is informed
  - No coercion
6. FINANCING ISSUES
Financing Issues

• Issues for private equity buyers (and strategic buyers relying on financing)
  • Failure to move at the speed of a tender offer can be a disadvantage

• Access to collateral
  • A bidder that owns only part of the target, even if a majority (i.e., while waiting to complete the back-end merger) generally cannot grant security interests in the target’s assets
  • Margin rules limit value of loan secured by shares purchased in tender offer (generally to 50% of the value of the securities)
  • Solution: Close the back-end ASAP, or switch to a merger

• Need to coordinate debt marketing period with shorter tender offer period
Financing Issues (cont.)

- SEC requirements with respect to amending tender offers
- Common SEC staff comment regarding tender offer financing conditions
  - Generally, when an offer is not financed, or when a bidder’s ability to obtain financing is uncertain, a material change will occur in the information previously disclosed when the offer becomes fully financed.
  - Under Rule 14d-3(b)(1), a bidder is required to promptly file an amendment to its Schedule TO disclosing this material change.
  - Please confirm that the bidders will disseminate the disclosure of this change in a manner reasonably calculated to inform security holders as required by Rule 14d-4(d).
  - In addition, please confirm that five business days will remain in the offer following disclosure of the change or that the offer will be extended so that at least five business days remain in the offer. Refer to Exchange Act Release Nos. 23421 (July 11, 1986 at footnote 70) and 24296 (April 3, 1987).
Financing Issues (cont.)

  - The minimum period during which an offer must remain open following material changes in the terms of the offer or information concerning the offer, other than a change in price or percentage of securities sought, will depend on the facts and circumstances, including the relative materiality of the terms or information.
  - As a general rule, the Commission is of the view that, to allow dissemination to shareholders “in a manner reasonably designed to inform [them] of such change” (17 CFR 240.14d-4(c)), the offer should remain open for a minimum of five business days from the date that the material change is first published, sent or given to security holders.
  - If material changes are made with respect to information that approaches the significance of price and share levels, a minimum period of ten business days may be required ....
Financing Issues (cont.)

  - The tender offer provisions do not specifically establish a minimum time period with respect to disclosure and dissemination of other material changes. Given the continually evolving nature of tender offer practice, it is impracticable to delineate every possible material change, its degree of significance, or the requisite time period attendant to that change.
  - However, disclosure and dissemination of material changes must allow security holders the opportunity effectively to consider such information and factor it into the decision whether, to tender shares, withdraw shares already tendered, sell into the market, or hold their shares.
Financing Issues (cont.)

  • It is the Commission’s view that, under the circumstances of this case, when CRTF has obtained commitments for all or substantially all of the remaining financing needed to complete its offer, that will be a material change in its offer which will have to be disclosed.
    • Shareholders will have to be provided a minimum of five business days to consider that change.
  • The fact that financing has been obtained may be material to a reasonable investor, who may not wish to tender his stock into the offer until he knows that financing has been obtained. The investor may wish to preserve his option to sell into the market or tender into a competing offer, and may elect not to tender unless financing has been obtained. But if an extension were not required after loan comments are obtained, a shareholder would have to tender into the offer before he knows whether the funds will be available, since he would not have time to do so after he does know, in what may be prove to [be] a non-viable, and perhaps illusory, offer, thereby limiting his ability to take advantage of other investment options.
    • The expressions of willingness do not materially change the information available to shareholders since they create no legal obligation to provide a commitment.
  • The arrangement of financing is a matter peculiarly within the control of the bidder, who will be aware of the obstacles to financing and the time periods likely to be required to obtain financing. The bidder is in a position to give shareholders adequate time to consider the material terms of its financing arrangements, and should not be allowed to shift to shareholders the burden of guessing whether and when financing will be obtained.
7. SEC OVERLAY – EXTRA CONDITIONS and RULES
Other SEC Requirements

• **Conditions to the Offer**
  • SEC view is that a tender offer can be subject to conditions only where the conditions are based on objective criteria and the conditions are not within the bidder's control

• **Price Changes**
  • Certain changes (e.g., consideration, percentage sought) to terms of the tender offer require offer to be extended for 10 business days

• **Withdrawal Rights**
  • The ability to withdraw a tender while the offer is open is required in tender offers that are subject to Exchange Act Rule 13e-4 and Regulation 14D
Other SEC Requirements (cont.)

- **Pro Rata Acceptance**
  - Shares must be accepted on a pro rata basis, in tender offers that are subject to Exchange Act Rule 13e-4 and Regulation 14D

- **Target Recommendation**
  - Target required to make a recommendation to security holders regarding the offer within 10 business days of commencement

- **No purchases outside the Tender Offer (14e-5)**
U.S. Treatment of Cross-Border Takeovers

- 1999 amendments to SEC tender offer rules provided for exemptions to the general rules if:
  - The target is a foreign private issuer
  - Level of U.S. shareholder ownership in the target
  - Available to both U.S. and foreign bidders
  - Equal Treatment (terms at least as favorable as those offered to foreign shareholders)
  - Informational requirement (disseminate as done in the home jurisdiction; filed Form CB with SEC)
- 2008 amendments expanded and enhanced exemptions
Best Price Rule

• Old BPR potentially exposed bidders to significant damages
• 2006 amendments to BPR clarified that rule did not apply to employment compensation, severance or other employee benefit arrangements, where:
  1. Paid or granted as comp for past services or future services performed or to be refrained from performing, and
  2. Not calculated based on the number of securities tendered
• SEC was trying to remove “regulatory disincentive” to use of tender offer compared to merger
BPR (cont.)

• The SEC also provided a non-exclusive safe harbor
  • Arrangements must be approved as employment comp, severance or other employee benefit arrangements
  • Approval may be granted by comp committee or another committee of the board, comprised solely of independent directors, of either:
    • the target, for all such arrangements, or
    • the acquiror, for any such arrangement to which the acquiror is a party.
  • Independence determined by reference to stock exchange listing standards
  • If target or acquiror, as applicable, does not have a comp committee or similar committee, the approval may be provided by a special committee formed to consider the arrangements
Sample BPR Provision

• From a recent agreement:

Prior to the Acceptance Time … the Compensation Committee … will[:]
[1] approve, as an “employment compensation, severance or other employee benefit arrangement” within the meaning of Rule 14d-10(d)(2) under the Exchange Act, each agreement, arrangement or understanding between Merger Sub, the Company or their respective Affiliates and any of the officers, directors or employees of the Company that are effective as of the date of this Agreement or are entered into after the date of this Agreement and prior to the Acceptance Time pursuant to which compensation is paid to such officer, director or employee[,] and

[2] … take all other action reasonably necessary to satisfy the requirements of the non-exclusive safe harbor set forth in Rule 14d-10(d)(2) under the Exchange Act.
• SEC noted that targets with employees or directors who enter into arrangements with the bidder or the target will stay outside the BPR if such employees or directors do not tender their securities into a tender offer
  • Leads to some use currently of “non-tender” agreements
• Some questions remain; the SEC did not address other desired exemptions, such as for commercial arrangements other than compensatory arrangements, or degree of specificity required of the committee approval for the safe harbor
8. SEC M&A-RELATED UPDATES
Other Areas of SEC Staff Focus

- Going private transactions
  - In the matter of Revlon, Inc. (settlement) (6/13/13)
- Proxy contests
  - Universal ballots
  - Solicitor activities
Conclusion

Any Questions?
BIOS
Michael O’Bryan

Michael O’Bryan is a partner in MoFo’s global M&A practice. He focuses on U.S. and international mergers, acquisitions, divestitures and other strategic transactions, including “going private” and other related party transactions.

He has been involved in more than 350 M&A transactions, advising companies, boards and special committees, as well as investment banks, in negotiated and contested transactions. He has worked with clients across a variety of industries, including in technology, software, telecommunications, internet, consumer, and healthcare / life sciences sectors.


Mr. O’Bryan is active in the ABA’s M&A Committee, where he chairs a task force preparing a model Tender Offer Agreement and a task force reviewing M&A cases.

Michael O'Bryan
Morrison & Foerster LLP
(415) 268-6352
mobryan@mofo.com
Brian V. Breheny

Brian V. Breheny is a partner at Skadden, Arps, Slate, Meagher & Flom LLP. He concentrates his practice in the areas of mergers and acquisitions, corporate governance, and general corporate and securities matters. Since joining Skadden, Mr. Breheny has advised numerous clients on a full range of SEC compliance and corporate governance matters, including advising clients on compliance with the provisions of the Dodd-Frank Act, the SEC’s tender offer rules and regulations and the federal proxy rules.

Prior to joining Skadden in 2010, Mr. Breheny held a number of leadership positions in the Division of Corporation Finance at the U.S. Securities and Exchange Commission. He began as chief of the SEC’s Office of Mergers and Acquisitions in July 2003, and in November 2007 he became deputy director, legal and regulatory policy.

In his position as chief of the Office of Mergers and Acquisitions, Mr. Breheny oversaw the legal and technical aspects of the administration of the Securities Act of 1933 as it related to tender offers and mergers; the proxy, beneficial ownership reporting, tender offer and going-private provisions of the Securities Exchange Act of 1934; and the rules, regulations, forms and procedures promulgated to implement these statutory provisions. As deputy director, he was a member of the senior staff of the commission with responsibility for the division’s legal and regulatory policy support offices (chief counsel, chief accountant, mergers and acquisitions, international corporate finance, rulemaking, small business policy and enforcement liaison).

During his tenure at the SEC, Mr. Breheny assisted the commission with its consideration of significant rule amendments in a number of areas including shareholder director nominations, tender offers, beneficial ownership reporting, electronic delivery of proxy materials, electronic shareholder forums, short sale disclosure, and proxy voting and shareholder communications.

Before joining the SEC, Mr. Breheny worked at another international law firm in its New York and London offices. During his previous seven years in private practice, he advised clients engaged in a broad range of merger and acquisition transactions, securities issuances, private equity investments, banking and public financings, fund formations and corporate reorganizations. Mr. Breheny began his career as a certified public accountant with KPMG LLP. He recently was selected for inclusion in Chambers USA: America’s Leading Lawyers for Business 2013 and The International Who’s Who of Corporate Governance Lawyers 2013.

brian.breheny@skadden.com  202-371-7180
Frederick H. Alexander is Chair of the firm’s Executive Committee and a member of the Corporate Counseling Group of Morris, Nichols, Arsh & Tunnell LLP, which specializes in providing advice on corporate governance and transactions, including mergers and acquisitions, capital raising and corporate control contests. Mr. Alexander’s work often involves counseling boards of directors and board committees, including special committees of directors appointed to negotiate mergers or other significant transactions. He also provides formal legal opinions on issues involving Delaware corporate law and related matters.

Mr. Alexander formerly chaired the Council of the Corporation Law Section of the Delaware State Bar Association and the General Review Task Force of the ABA Committee on Corporate Laws. He currently serves as Co-Chair of the ABA Task Force on Two Step Mergers and the Planning Committee for the Tulane Corporate Law Institute.

In 2012, Mr. Alexander was named as one of the ten most highly regarded corporate governance lawyers worldwide by The International Who’s Who of Corporate Governance Lawyers. Mr. Alexander was selected by Best Corporate Law Lawyers as the 2013 Delaware Mergers & Acquisitions Lawyer of the Year and the 2012 Delaware Corporate Law Lawyer of the Year. He is named as one of the 500 leading lawyers in the United States by the Lawdragon guide, and is listed in the top category for Delaware Corporate/M&A lawyers Chambers USA: America’s Leading Lawyers for Business.

He is the co-author of The Delaware Corporation; Legal Aspects of Organization and Operation 1-4th C.P.S. (BNA 2010) and has written numerous articles, including Forum Selection By-laws: Where We Are and Where We Go From Here (Insights 2013); The Multi-Jurisdictional Stockholder Litigation Problem and the Forum Selection Solution (Corporate Counsel Weekly 2011); Responding to Unsolicited Takeover Offers (Conference Board 2009), and Power to the Franchise or the Fiduciaries?: An Analysis of the Limits on Stockholder Activist Bylaws (Delaware Journal of Corporate Law, 2008).

Frederick H. Alexander
Morris, Nichols, Arsh & Tunnell LLP
1201 N. Market Street
Wilmington, DE 19801
(302) 351-9228
falexander@mnat.com
Michele M. Anderson has been the Chief of the Office of Mergers and Acquisitions in the Division of Corporation Finance of the U.S. Securities and Exchange Commission since 2008. Ms. Anderson oversees the regulation of domestic and cross-border M&A transactions as well as the statutory and regulatory interpretive functions of the SEC as they relate to tender offers, mergers, contested and other non-routine proxy solicitations, going private transactions, reorganizations, debt restructurings and beneficial ownership reporting. Among other matters, she led the team that advised the Commission on its approval of disclosure rules that apply to the use of security-based swaps by large equity holders. Additionally, she has participated in other significant projects and rulemaking matters in a number of areas such as shareholder approval of executive compensation and golden parachute compensation, shareholder director nominations, proxy voting mechanics and shareholder communications, and cross-border business combinations.

In 2010, Ms. Anderson received the SEC’s Excellence in Leadership Award, which is awarded annually to supervisors who achieve results by excelling in both their “people” and “program” responsibilities. She is a two-time recipient of the agency’s Law and Policy Award for contributions relating to the Dodd-Frank Wall Street Reform Act (2010 and 2011).

Ms. Anderson has been a member of the staff at the SEC since 1998. Prior to leading the Office of Mergers and Acquisitions, she served in a variety of positions in the Division of Corporation Finance, including branch chief of the group responsible for the review of the federal securities law filings, including registration statements, periodic reports and proxy materials, made by telecommunication companies and service providers. In addition to her duties at the SEC, Ms. Anderson has served as an Adjunct Professor of Law at the Georgetown University Law Center, where she taught the course “Takeovers, Mergers and Acquisitions.” Ms. Anderson received her B.A., magna cum laude, Phi Beta Kappa, from the University of Colorado at Boulder and her Juris Doctorate from the University of Colorado Law School.
David King is a Managing Director in Bank of America Merrill Lynch’s technology M&A practice in Palo Alto. David has been with BofA Merrill Lynch for 13 years and has extensive experience advising technology clients on acquisitions, corporate sales and divestitures, and defense. Recent technology transactions include Dell’s acquisition of Quest Software, sTec’s sale to Western Digital, Novellus’s sale to Lam Research, Sybase’s sale to SAP, Western Digital’s acquisition of Hitachi Global Storage Technologies, AMD subsidiary GlobalFoundries’ acquisition of Chartered Semiconductor, Blade Network’s sale to IBM, Salesforce.com’s acquisition of Radian6, HP’s acquisition of Palm and Mercury Interactive, Semitool’s sale to Applied Materials, Broadcom’s unsolicited offer for Emulex, Foundry Networks sale to Brocade, eBay’s acquisitions of Bill Me Later and Skype, Golden Gate Capital portfolio company PlantCML’s sale to EADS, Nextest’s sale to Teradyne, Postini’s sale to Google, FileNet’s sale to IBM, Sybase’s acquisition of Mobile365, Lipman’s sale to VeriFone, the sale of Itronix to General Dynamics, the sale of Perabit to Juniper, Imation’s acquisition of Memorex, Siebel’s acquisitions of eDocs, Eontec and UpShot, and Veeco’s acquisitions of Emcore’s TurboDisc business, Advanced Imaging and Applied Epi.

Prior to joining Merrill Lynch in 2000, David was a Principal Consultant at Price Waterhouse LLP. David received his MBA in Finance and Accounting from the University of Chicago and his BA in Economics from Georgetown University.

David King
Bank of America Merrill Lynch
(650) 849-2310
dking@baml.com
Hal J. Leibowitz

Hal Leibowitz is Co-Chair of WilmerHale’s Mergers and Acquisitions Group. Mr. Leibowitz’s practice focuses on corporate and securities law matters for companies in the technology, life sciences and services industries, with an emphasis on mergers and acquisitions and public company counseling. He routinely advises clients and their boards of directors on a wide range of merger and acquisition transactions, including acquisitions and dispositions of public and private companies, tender offers, exchange offers and going private transactions.

Mr. Leibowitz has consistently been recognized as a leader in mergers and acquisitions. He is named as a leader in corporate/M&A in the 2007 - 2013 editions of Chambers USA: America’s Leading Lawyers for Business, and recognized in the 2004 - 2013 editions of Boston Magazine as a "New England Super Lawyer" for mergers and acquisitions, as well as for his representation of public companies. Mr. Leibowitz is a member of the American Bar Association’s Merger and Acquisitions Committee, including the Committee’s Subcommittee on M&A Market Trends (Chair) and Subcommittee on Acquisitions of Public Companies, and served as Chair of the Market Trends Subcommittee’s 2010, 2011 and 2012 Deal Points Studies on the Acquisition of Public Companies.

Hal J. Leibowitz
WilmerHale
617-526-6461
hal.leibowitz@wilmerhale.com
REFERENCE MATERIALS
Reference Materials

- Text of DGCL Section 251(h) and Synopsis
- Proposed DGCL Section 251(h), presentation by Morris Nichols
- Amendments to the Tender Offer Best-Price Rules, SEC, 17 CFR Parts 200 and 240 Release Nos. 34-54684, November 1, 2006