ACQUIRING A US PUBLIC COMPANY: AN OVERVIEW FOR THE NON-US ACQUIRER

LATHAM & WATKINS LLP

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I. Introduction

This guide summarizes certain important considerations for a non-US acquirer seeking to acquire a publicly traded US-based target corporation through a negotiated (*i.e.* “non-hostile”) tender offer, exchange offer or merger.

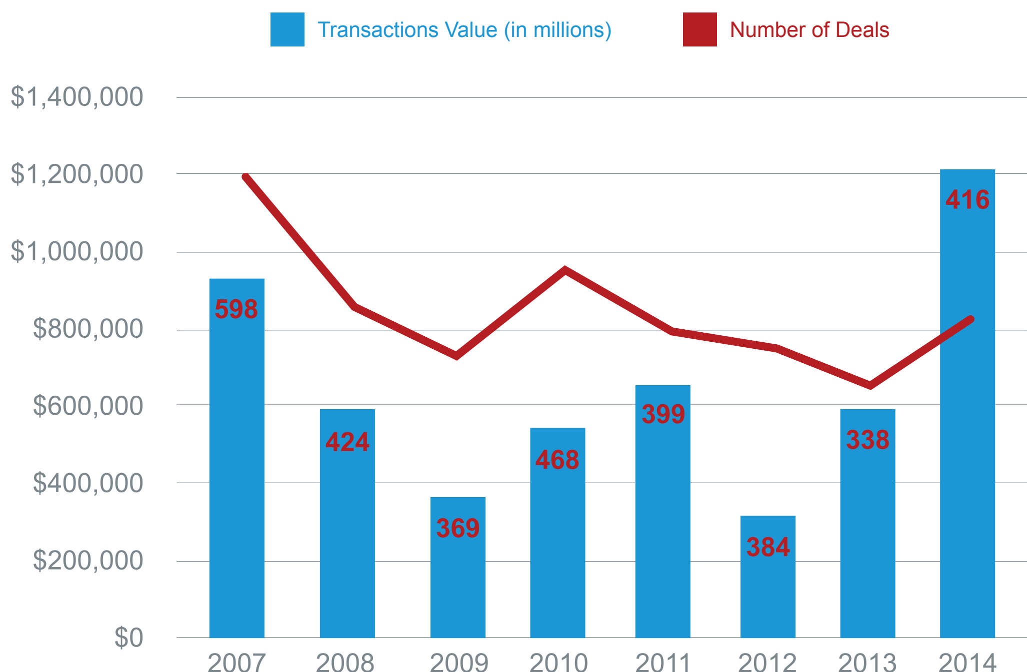
US public companies are subject to the laws of the US state in which they are incorporated, as well as US federal securities, competition and other laws. Over 50 percent of public companies and almost two-thirds of the US Fortune 500 are incorporated in the state of Delaware (Source: Delaware Secretary of State), so this guide focuses on several key Delaware law provisions relevant to acquisitions of US public companies incorporated in Delaware.

Please note that the legal issues that arise in the acquisition of a US public company require careful analysis and must be addressed on a case-by-case basis depending upon all the facts and circumstances. There is no “standard transaction” or formula, and each acquisition is different depending on the circumstances. This guide is not intended to be a comprehensive summary or analysis of all the issues that may arise in the acquisition of a US public company or a strict map of the course of a transaction, and, therefore, should not be construed as providing specific advice with respect to any particular situation.

II. The US M&A Market

In 2014, the mergers and acquisitions (M&A) market in the US was booming, with activity at levels not seen since before the global recession of 2009-2010. In 2014, 416 M&A deals were announced with US public companies, worth a combined total of more than US$1.2 trillion, as compared to 338 deals worth almost US$579 billion in 2013. In the first quarter of 2015, 102 deals were announced worth a total of more than US$354 billion (Source: FactSet MergerStat).

VALUE/COUNT OF US PUBLIC COMPANY M&A DEALS



WHAT IS A US PUBLIC COMPANY?

The term “US public company” as used in this guide, refers to a US company (most often a corporation) that both:

- Has securities publicly traded on a US securities exchange, the issuance of which is governed by the requirements of the US Securities Act of 1933, as amended (the Securities Act)
- Is required to file various financial reports and other information with the US Securities and Exchange Commission (the SEC) under the US Securities Exchange Act of 1934, as amended (the Exchange Act)

Interest in acquiring US companies is particularly strong today among non-US acquirers, representing approximately 23 percent of public M&A transactions announced in 2014, as compared to 15 percent of public M&A transactions in 2013 (Source: FactSet MergerStat).

III. Friendly or Hostile? Deciding on the Approach to a Target

The acquisition of a US company can be made on a **friendly** basis, pursuant to a definitive agreement that has been negotiated with the target and its board of directors, or it can be approached on a **hostile** basis, without the involvement or prior approval of the board of directors of the target.[1] In our experience a negotiated transaction has numerous, distinct advantages over a hostile transaction, including the availability of due diligence on the target, cooperation of the target’s management, faster closing and reduced costs. This does not mean that a hostile transaction is never the appropriate or best strategy for an acquisition of a US public company. Our experience strongly suggests, however, that a hostile transaction should be pursued only if the acquirer understands the complexity and risk, and then only if the acquirer believes negotiation will be futile or negotiated alternatives have been exhausted. Although this guide does not cover the considerations and process involved in starting or completing a hostile transaction, Latham & Watkins has significant experience counseling clients on such transactions and would be happy to discuss and outline these considerations with a potential acquirer considering a hostile approach to a potential target.

IV. The Basics: Transaction Structures

An acquisition of a US public company generally is structured in one of two ways: (i) a statutory merger (a merger governed by US state law) or (ii) a tender offer (or exchange offer) followed by a “back-end” merger. We often refer to statutory mergers as **one-step** mergers and tender or exchange offers followed by back-end mergers as **two-step** mergers. Regardless of whether an acquirer uses a one-step or two-step acquisition structure, the acquirer may pay in cash, the stock of the acquirer or a combination of the two. We summarize and compare these two acquisition structures and related process and timing considerations for a negotiated acquisition using each structure.

US DEAL POINT: ELIMINATION OF MINORITY INTERESTS IN A US COMPANY

Unlike many European jurisdictions, there is no extraordinary level of ownership or vote required to effect a merger that forcibly converts shares into merger consideration. This affords an acquirer seeking to own the entire share capital of a business the ability to quickly and effectively eliminate minority interests, subject in certain cases, to a post-closing court supervised valuation by means of an appraisal proceeding (*see* “Appraisal Rights”).

A. One-Step: Statutory Merger

A statutory or one-step merger is a merger of one legal entity into another, as dictated by US state corporate law. A one-step merger requires that the acquirer negotiate a definitive merger agreement with the target, which typically must first be approved and declared advisable by the target's board of directors, then separately approved by the holders of the target's outstanding stock. This shareholder vote most commonly requires approval of a majority of the target's outstanding shares, but by the terms of a target's organizational documents' or the requirements of some states' corporate laws (other than Delaware's), a higher vote requirement can be imposed. A one-step merger cannot be completed on a hostile basis without the approval of the target's board of directors.

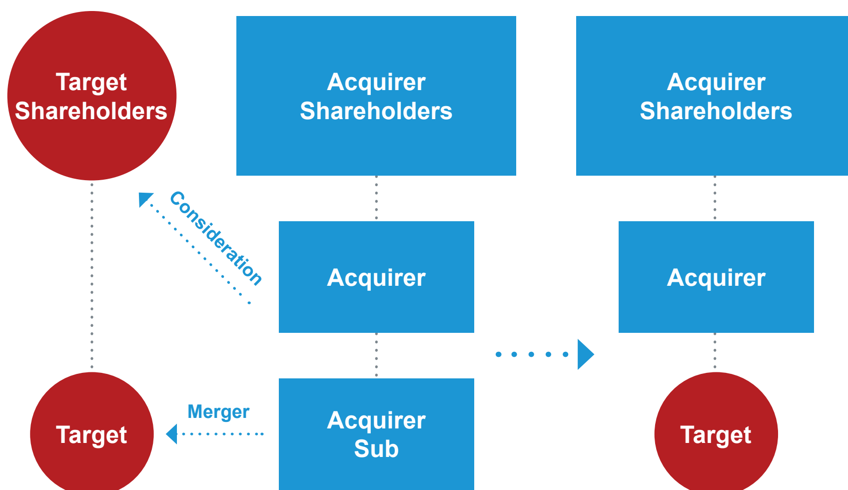
In mergers with US public companies, the one-step transaction structure most often takes the form of a "reverse triangular merger," which is illustrated below. The reverse triangular merger is the most popular one-step merger structure used in US public company mergers today, particularly for cash transactions. Other structures of course are available, however, and the specific form of the merger should be determined in light of relevant tax, accounting, governance and other business considerations.

A reverse triangular merger is performed as follows:

In 2014, approximately 59 percent of all mergers involving US public companies used the reverse triangular merger structure

(Source: FactSet Merger Metrics).

REVERSE TRIANGULAR MERGER



1. The acquirer forms a new wholly owned US subsidiary to act as an acquisition corporation.
2. At the effective time of the merger, the new acquisition corporation is merged with and into the target, with the target surviving the merger. The target's shareholders receive the approved per-share merger consideration upon consummation of the merger.
3. After consummation of the merger, the target is a wholly owned subsidiary of the acquirer.

WHAT IS IN A TYPICAL MERGER AGREEMENT?

- **Representations and Warranties.** A typical merger agreement for the acquisition of a US public company, regardless of structure, generally will provide for representations and warranties on the part of the target, including representations with respect to capitalization, no material adverse change, no undisclosed liabilities, litigation, compliance with laws, accuracy of public filings, financial statements, material contracts, employee benefits and tax matters, in addition to customary organization and structure representations.[2]
  - *Timing and Scope of Representations:* These representations and warranties, which often contain qualifications limiting their breadth and severity, are made on the date of the agreement and, in most circumstances, are also "brought down" on the closing date of the merger.
- **Conditions.** The merger agreement also specifies the conditions to the consummation of the merger or, in a two-step transaction, the tender or exchange offer and the merger.
- **Indemnity.** In a public company context, only very rarely would a merger agreement provide for an indemnity from the target company in favor of the acquirer. As a result, the consequence of a target's breach of a representation is to afford the acquirer the right to terminate the agreement as opposed to closing over the breach and seeking indemnity.
- **Deal Protection.** Generally, the merger agreement contains deal protection provisions. These may include no-shop provisions, "fiduciary out" provisions to allow the target's board to consider, recommend and, in many cases, terminate to accept a superior proposal, and breakup fees, the specific language and amount of which is negotiated on a case-by-case basis. In addition, if a target corporation has a controlling shareholder or a shareholder with a significant ownership percentage, an acquirer sometimes receives extra deal protection by obtaining the shareholder's agreement to tender or exchange its shares in the offer or vote in favor of the merger.

Seeking Shareholder Approval: Filing a Proxy Statement with the SEC

Following the execution of the merger agreement, the target in the one-step merger typically is required to file with the SEC a preliminary proxy statement on Schedule 14A regarding the shareholder vote on the transaction. This is the key disclosure document for shareholders (see "What is in a Typical Proxy Statement?").

If the consideration in the merger includes acquirer securities, those securities are generally required to be registered with the SEC, which means that the transaction will also be subject to the registration requirements of the Securities Act. In that case, the acquirer will file a registration statement on Form S-4 (US registrant) or Form F-4 (foreign private issuer) with respect to its issuance of acquirer securities in the merger. In addition to the information otherwise required to be disclosed by the target in its proxy statement, this disclosure document addresses information about the acquirer and the acquirer securities, including certain financial information and related projections, if deemed to be material to the transaction. The parties typically combine their respective disclosure documents into a single document referred to as a "proxy statement/prospectus," and this combined document will be filed on Form S-4 or Form F-4, as applicable, in accordance with SEC rules.[3] Further, if shareholder approval of the acquirer is required, most commonly when the share issuance by the acquirer exceeds 20 percent of its outstanding shares, the proxy statement will often be used as a joint proxy statement by the parties.

WHAT IS IN A TYPICAL PROXY STATEMENT?

A merger proxy statement includes information about the target, the acquirer and the merger. Among other information and disclosures, a proxy statement will contain the following information:

- **Background.** A narrative section describing the background of the merger, including negotiations and discussions and between the acquirer and target and their representatives
- **Terms.** A description of the merger, including a summary term sheet and a description of the approvals (regulatory or otherwise) that must be obtained by the parties to complete the transaction
- **Target Board Recommendation.** The recommendation of the target's board of directors regarding the proposed merger and the reasons for the recommendation
- **Opinion.** A summary of any opinion the target obtained with respect to the fairness of the transaction
- **Financials.** The target's financial statements and projections (and, if consideration includes acquirer securities or a vote of the acquirer's shareholders is required, financial information of the acquirer)
- **Meeting and Vote.** A summary of the shareholders meeting, the voting procedures and the participants in the proxy solicitation
- **Directors, Officers and Major Shareholders.** Information regarding the directors, officers and beneficial owners of five percent or more of the target's shares

Parties to a merger must wait to receive comments from the SEC to the proxy statement (or the proxy statement/prospectus, as applicable) and resolve all comments received prior to distributing definitive disclosure documents to the target shareholders. Once the preliminary proxy statement on Schedule 14A (or proxy statement/prospectus on Form S-4 or Form F-4) is filed with the SEC, the SEC will notify the target within **10 calendar days** if it intends to review the filing. If there is an SEC review of the filing, the SEC typically takes up to **30 calendar days** from the original filing date to provide comments to the parties. The target and acquirer will amend their filings in response to these comments and work with the SEC to resolve any open issues. If the SEC has additional comments, there may be additional delay, as the disclosure document is reviewed and re-filed by the parties. This process can take **several weeks, and up to several months**, depending on the nature and extent of the SEC comments and the changes required to be made.

Target Shareholder Approval

When all SEC comments are resolved, a date for the target shareholder meeting will be set and a definitive disclosure document, accompanied by a proxy card to effect the vote, will be sent to the target's shareholders. The parties generally should provide sufficient time to ensure an active solicitation period and an informed shareholder vote, which is typically at least **20 to 30 business days**; further, under Delaware law, a meeting of the target's shareholders to approve a merger may not be held prior to **20 calendar days** after mailing of the proxy statement. There may be additional requirements in a target's organizational documents that govern the timing of and requirements for the shareholders meeting.

Consummation of the Merger

Assuming all regulatory and other conditions to the merger have been satisfied at the time of the shareholder vote, the acquirer would typically complete the merger immediately following shareholder approval. The merger process typically takes between 10 to 12 weeks from signing of the merger agreement to completion of the merger (see Annex A).

Appraisal Rights

In connection with a typical merger transaction involving cash or unlisted shares, even if the merger is approved by a majority of the target's shareholders and the merger is completed, US state corporate law (including Delaware) will provide that target shareholders who voted no or abstained from voting on the merger generally are eligible to exercise appraisal rights to demand a judicial determination of the "fair value" of their shares. "Fair value" will be determined by the applicable state court and may be more than, equal to or less than the merger consideration, provided that the shareholders follow the statutory procedures for demanding an appraisal, and subject to certain exceptions.[4] Shareholders who vote in favor of the merger should not be eligible for appraisal rights.

- The appraisal rights process can be lengthy, spanning one year or more after closing, although often appraisal claims are settled in advance of a final judicial decision.
- Shareholders exercising appraisal rights only retain the right to payment, in cash, of the "fair value" of their shares, as determined by an applicable state court in an appraisal proceeding.
- The target is not required to obtain a third-party valuation in connection with the appraisal proceeding, although such valuations often are furnished to the court as evidence of fair value.
- Shareholders do not have appraisal rights if they tender into a tender offer — those who object to the offer simply do not tender their shares. However, appraisal rights will be available to non-tendering shareholders in any "back-end" or "squeeze out" merger following the consummation of the offer if cash or unlisted shares comprise any portion of the consideration.

US DEAL POINT: OBJECTING SHAREHOLDERS' OWNERSHIP OF TARGET SHARES

Unlike certain non-US jurisdictions, shareholders exercising appraisal rights **do not** retain ownership of their shares and the appraisal rights process **does not** affect the acquirer's ownership or control of the target. The acquirer will retain 100 percent ownership of the target in the merger without regard to whether appraisal rights are exercised.

RECENT TRENDS IN APPRAISAL DEMANDS

Historically, shareholders rarely exercised appraisal rights, given the costs required to be incurred by the exercising shareholders and the risk that the exercising shareholders could receive less than the merger consideration. Recent experience suggests that appraisal rights actions are becoming more common, however, as certain hedge funds have pursued appraisal rights as an independent investment opportunity, leveraging the possibility of an appraisal award that exceeds the price paid in the merger and the ability to receive statutory interest on any such award at a rate well in excess of current market interest rates.

In response to this recent trend, parties may choose to include a "dissenters rights" condition in the merger agreement, although still relatively uncommon. These provisions state that an acquirer will not be required to close a transaction in which holders of over a specific percentage of a target's stock (usually between five and fifteen percent) have exercised appraisal rights.[5]

B. Two-Step: Tender Offer or Exchange Offer Followed by a "Back-End" Merger

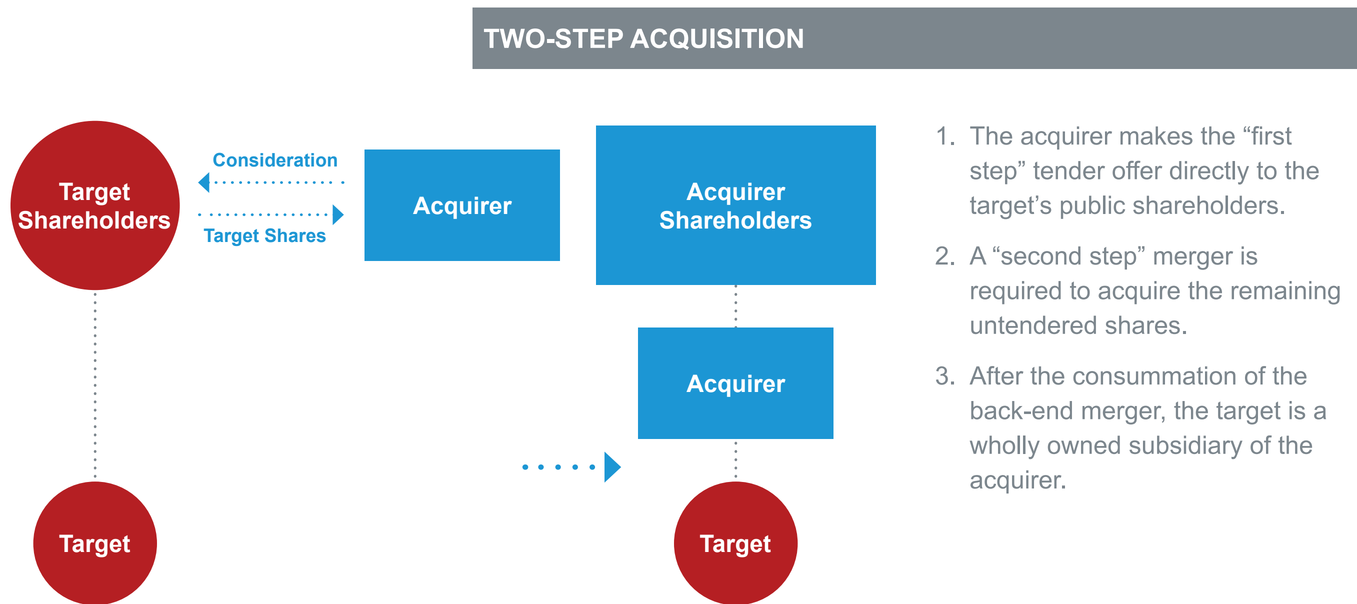
A tender offer or an exchange offer, followed by a "back-end" or "squeeze out" merger, is referred to as a "two-step acquisition." Cash offers for the target's shares are called **tender offers** and offers in which the consideration includes acquirer securities or a combination of cash and securities are called **exchange offers**. In a two-step acquisition, an acquirer first makes a public offer to acquire the shares of the target directly to the target shareholders, each of whom then makes an independent decision whether to sell (or "tender") their shares to the acquirer, in exchange for the cash and/or acquirer securities offered. Following the completion of this "first step" tender offer or exchange offer, the target will complete a statutory merger with the acquirer. In a friendly transaction, the tender offer or exchange offer will be made pursuant to a negotiated merger agreement with the target company and its board of directors.

WHAT IS A "SHORT-FORM" MERGER?

A "**short-form**" merger is the name given to a merger that is effected, following an acquirer's purchase of a specified percentage of a target's shares in a tender offer, without any requirement to obtain a separate vote of the target's shareholders. A short-form merger can be accomplished very quickly after completion of the tender offer or exchange offer, without the need for the additional SEC disclosure required in a typical "long-form" merger structure. Although US state corporate laws vary, in almost all cases a short-form merger can be completed if the acquirer obtains over 90 percent of a target's shares after the tender offer or exchange offer. In addition, a relatively new provision of Delaware corporate law provides that, if certain procedural requirements are met, a "short-form" merger can be completed immediately following an acquirer's purchase of more than 50 percent of the target's shares in a tender offer or exchange offer (see "Easing the Financing and Completion of a Tender Offer: DGCL Section 251(h)").

Those shareholders who do not tender their shares and are subsequently squeezed out retain appraisal rights and other rights afforded to them as shareholders under Delaware or other applicable state law.

A typical two-step acquisition is structured as follows:



The Offer

In order to commence its offer, on the date of commencement the acquirer files with the SEC and distributes to the target shareholders a Schedule TO, to which an "Offer to Purchase" (for a tender offer) or "Exchange Offer/ Prospectus" (for an exchange offer) is attached as an exhibit. The Schedule TO contains detailed information about the acquirer, the acquirer's offer to purchase and details about the terms and conditions of the offer, including financial information and a description of the factual background of the transaction similar to a merger proxy statement.[6]

An acquirer issuing securities as full or partial consideration in the offer must also register the offered shares under the Securities Act by filing with the SEC a registration statement on a Form S-4 or Form F-4. The Form S-4 or Form F-4 primarily includes the Exchange Offer/ Prospectus also filed as an exhibit to Schedule TO.

The target's board of directors must also file with the SEC a recommendation statement (filed on a Schedule 14D-9) regarding the target's position on the offer within 10 days following its commencement. In a friendly negotiated transaction, the Schedule 14D-9 will contain disclosure substantially identical to that in the Schedule TO, and be filed contemporaneously.

If enough shares are tendered in the tender or exchange offer (typically 50 percent to two thirds of the target's shares, depending on the circumstances of the offer and applicable state corporate law — for more detail, see "Completion of the Transaction"), then the acquirer will purchase those shares and, immediately afterward (subject to any required US regulatory clearances), the target may perform a back-end merger and "squeeze out" those shareholders who did not tender their shares in the offer by converting their shares into the right to receive the per-share consideration paid in the offer.

Conditions to the Offer

The acquirer's obligation to accept and pay for the target shares tendered is generally subject to a number of conditions, which are outlined in its Offer to Purchase, the most important of which is the so-called "minimum condition" to the offer. The minimum condition of the offer is the minimum number of target shares (generally at least 50 percent) that must be tendered or exchanged in order for the acquirer to be obligated to purchase the shares. The vote and merger would be assured, however, if the bidder's offer's minimum condition is the exchange of a sufficient number of shares to ensure the vote required to approve the "long-form" merger. In many US states, including Delaware, only a majority of the target's shares must be tendered to ensure such approval, and therefore, the minimum condition is typically expressed as a majority of the target's shares on a fully diluted basis.

Unlike in many non-US jurisdictions, a tender offer may be expressly conditioned on receipt of third party debt financing, although this type of condition would be viewed to weaken the strength of the tender offer.

Timing of the Offer

A tender offer or exchange offer must remain open for at least **20 business days**.[7] Target shareholders may tender or exchange their shares, and have the right to withdraw their shares, at any time prior to the date of expiration of the offer. The acquirer may be required to extend the offer period if there has been a material change in the terms of the tender offer.

Once the acquirer has commenced the tender offer, the SEC may review and comment on the Schedule TO. In most cases, the SEC's comments are addressed by filing an amendment to the Schedule TO, but if the comments are significant, the SEC may require the acquirer to mail a supplement to the Offer to Purchase to the target's shareholders and, depending on when the offer is scheduled to expire, may also require an extension of the offer period for up to **10 business days**.

An exchange offer cannot close until the SEC declares "effective" the acquirer's registration statement that is related to the registration of the acquirer's shares offered as consideration in the exchange offer. While the SEC has committed publicly to provide comments in a manner timely to facilitate a 20-business-day offer period, our experience has been that review of the acquirer's registration statement can result in extensive comments, to which the acquirer may need to take several weeks to respond.

Completion of the Transaction

Following the expiration of the tender offer or exchange offer and purchase of the tendered shares, the acquirer and the target will work to complete a back-end statutory merger (most often via the reverse triangular merger structure described in the previous section).

- The acquirer and target may consummate a back-end merger immediately following the acquirer's purchase of shares in the tender/ exchange offer, if either:
  - The acquirer owns shares sufficient to effect a short-form merger; which in Delaware is at least 90 percent of each class of the target's outstanding voting shares after the expiration of its offer (including shares the acquirer owned prior to its consummation of the tender offer, if any, and shares purchased in the offer).

- In Delaware, if the acquirer owns shares of the target's outstanding shares after the expiration of its offer sufficient to approve a long-form merger *and* DGCL Section 251(h) is applicable to the transaction (see "Easing the Financing and Completion of the Tender Offer: DGCL Section 251(h)").

- If the short-form merger is not initially available or if DGCL Section 251(h) is not available to an acquirer (*i.e.* if the target is not incorporated in Delaware or if the acquirer does not otherwise qualify to use DGCL Section 251(h)), the acquirer has two other options available:
  1. The acquirer can try again to reach the 90 percent threshold necessary to effect a short-form merger by using a "clean-up" offer or "top-up" option.
     - The SEC allows a post-tender offer "clean-up" offer, which allows the initial offer to close and a "subsequent offering period" to be effected.
     - Delaware law also allows the target to grant the acquirer a "top-up" option (which is established in the merger agreement), in which the target issues to the acquirer the additional shares necessary to achieve 90 percent ownership, though the adoption of Section 251(h) has significantly reduced the use of this option and some legal and practical limitations on its utility do exist.
  2. The acquirer can consummate the acquisition on a "long-form" basis.
     - Requirements for a long form merger are those described in Section IV(A), above ("One-Step: Statutory Merger"), above with respect to a one-step merger, including the filing with the SEC and dissemination of a proxy statement and obtaining target shareholder approval.
     - Note that the vote and merger would be assured, as the acquirer's tender offer will contain a minimum condition such that a sufficient number of shares were tendered to ensure the vote required to approve the long-form merger.

Between January 2013 and December 2014, a total of 29 transactions structured as two-step mergers were consummated between non-US acquirers and US public companies, compared to a total of 116 one-step mergers between such parties during the same period (Source: FactSet MergerStat).

EASING THE FINANCING AND COMPLETION OF A TENDER OFFER: DGCL SECTION 251(h)

In August 2013, Section 251(h) of the Delaware General Corporation Law (DGCL) was adopted to allow an acquirer to effect a back-end merger following acquisition of more than **50 percent** of a Delaware target's outstanding shares (*i.e*. the percentage necessary to approve a merger), without needing to obtain the approval of those target shareholders who did not tender their shares in the tender offer.

- DGCL 251(h) requires that in order for the acquirer and target to effect this type of back-end merger, they must meet a number of conditions, including:
  - The parties must opt-in to the regime by stating in the definitive agreement that the merger is expressly permitted or required to be effected under Section 251(h).
  - The acquirer must consummate a tender offer for all outstanding shares of the target that would be entitled to vote to adopt the merger agreement.
  - After the tender offer, the acquirer must own (or have accepted for purchase/payment) at least the percentage of shares of the target that would be required to approve the merger agreement.

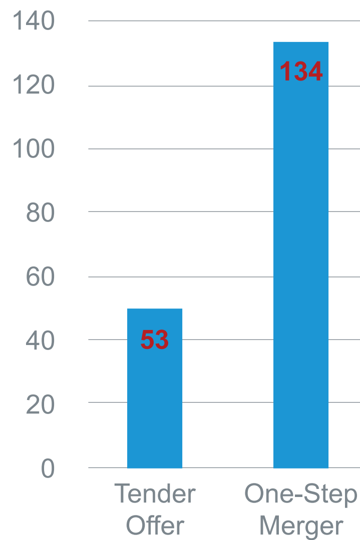
NOTE: Between the August 1, 2013 adoption of DGCL Section 251(h) and March 31, 2015, 53 out of 70, or 76 percent, of the tender offers governed by Delaware law opted to utilize the section (source: FactSet MergerMetrics).

C. One-Step or Two-Step? Deciding Which Structure to Use

Cash Consideration: Two-Step Structure Generally Preferred. In a negotiated cash transaction, the tender offer/back-end merger transaction structure is often preferred to a one-step merger structure for a number of reasons, including speed and control of the process:

- A tender offer can be completed in as little as 20 business days and without a shareholder meeting, compared to the more lengthy SEC review and proxy solicitation process required in the one-step merger structure.[8]
- The acquirer in a tender offer can obtain control of the target relatively quickly, and prior to the back-end merger (this is especially important in circumstances in which other parties may be interested in topping the primary bid).
  - The acquirer typically will negotiate for the right to appoint a number of directors to the target's board (and will require the corresponding resignation of an equivalent number of the target's directors) based on the percentage of shares acquired in the tender/exchange offer. An acquirer purchasing more than 50 percent of the outstanding shares of the target in its tender offer or exchange offer will, promptly following the purchase of shares, have the ability to appoint a majority of the target board and control the vote of a majority of the shares pending completion of the back-end merger.
  - In a one-step structure, because the acquirer acquires 100 percent of the stock of the target in a single transaction at the effective time of the merger, the acquirer will not be able to control the target, or have the ability to replace a portion of its board of directors, until the merger has occurred. The merger might take a prolonged period of time, depending on the timing of SEC review of the proxy statement filed in connection with the merger, providing interlopers a longer period in which to top the primary bid.
- The target shareholders can receive the transaction consideration in a tender offer faster than in a one-step merger.

DAYS BETWEEN SIGNING OF MERGER AGREEMENT AND CLOSING



Source: FactSet MergerStat. For completed US public company deals announced after January 2013 and before January 2015 and valued over $50 million.

Stock Consideration: One-Step Structure Preferred. If acquirer stock is used (in whole or in part, in combination with cash) as consideration in the acquisition, a merger is almost always preferred over an exchange offer because the acquirer shares issued to target shareholders in the transaction will need to be registered with the SEC, which requires SEC review and usually obviates any timing advantage of the two-step process. While the SEC has attempted to balance the treatment of tender offers and exchange offers by affording expedited review of the registration documentation filed in connection with exchange offers, the vast majority of US public company acquisitions involving consideration consisting in whole or in part of stock are one-step mergers.

Between January 1, 2012 and December 2014, 98 percent of US public company acquisitions that included stock as consideration were structured as one-step mergers. **(Source: FactSet MergerStat)**

Expected Extended Regulatory Review: One-Step Structure Preferred. In certain regulated industries, the antitrust or other regulatory approval process may be lengthy, eliminating the timing advantage of using the two-step structure. Typically, regulatory approval is required for an acquirer to purchase a significant amount of the target's shares. Because the target shareholders have the right to withdraw their shares at any time prior to the expiration of the offer period, an extended regulatory review period, and consequently extended offer period, potentially exposes the acquirer to additional risk that an interloper may try to top the primary bid during the extended period. For this reason, parties usually prefer a one-step merger structure, in which they can obtain the approval of the target shareholders prior to the acquirer's purchase of target shares, if antitrust or other regulatory review is expected to take significantly more time than the typical offer period and will preclude purchase of target shares until the review is complete (see "L&W Deal Note: Dual-Track Acquisition Structure in the Face of Regulatory Delay" for an example of a way one acquirer managed this regulatory review timing risk).

V. Regulatory Approvals and Other Considerations

The non-US acquirer should also be aware of several other important US company considerations faced by the parties to a US public company acquisition, including (but not limited to) the specific filing and disclosure obligations of federal securities laws, US federal banking regulations regarding margin stock, limitations on trading in non-public information and rules regarding the disgorgement of short swing profits. In addition, a non-US acquirer may need to obtain US regulatory review and approval (including, for example, approval under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act) and review under the Exon-Florio Amendment to the Defense Production Act of 1950 (Exon-Florio) (a so-called "CFIUS Review")) prior to completing the acquisition of a US public company. As noted below, the parties should expect HSR approval to take at least 30 calendar days after filing of a pre-merger notification form, which can be filed upon signing of the merger agreement. Specific approvals required will depend on the size of the target and the target's and the acquirer's industries.

The HSR Act and its Requirements

The HSR Act generally requires that an acquisition that results in the acquirer owning more than a certain amount (in 2015 it is US$76.3M; this amount is indexed annually for inflation) of the target's assets or voting securities cannot be completed until a statutory waiting period has expired or terminated.

To commence this waiting period, the acquirer is required to file a pre-merger notification form with the US Federal Trade Commission (FTC) and Department of Justice (DOJ). The information included in this form permits the FTC and DOJ to review the potential competitive implications of the transaction. Following this review, the FTC and DOJ could make a "second request" for information, which would substantially lengthen the delay before the acquirer could complete the transaction. In attempting to resolve antitrust issues that arise as a result of the "second request," the FTC and DOJ may demand concessions or divestitures from the parties to the transaction or seek to block the acquisition altogether.

The requisite waiting period under the HSR Act is 30 calendar days for all transactions other than tender offers and 15 calendar days for tender offers. Parties to a transaction generally seek to file such notification as promptly as practicable to start the clock on the waiting period.

CFIUS

When a non-US acquirer seeks to acquire a US target, if the target's business includes US infrastructure, technology or energy assets, the acquirer and the target may need to file a notification with the Committee on Foreign Investment in the United States (CFIUS) if the acquisition is deemed covered by Exon-Florio, which allows the US President to prevent a foreign company acquiring a US company if the President views the acquisition as a threat to national security. Although Exon-Florio does not include a mandatory filing requirement like the HSR Act, parties generally give notice of an acquisition if there is a reasonable likelihood that the US government could see the target as a participant in, or vital to, US national security.

VI. Conclusion

Mergers and acquisitions commonly mark significant milestones in the life of a public company and include a great degree of complexity. Given the numerous strategic and practical issues, as well as detailed US legal requirements, a party considering an acquisition of a US-based public company should understand the imperative to engage experienced legal counsel to help guide them through the process. Every such acquisition should be carefully analyzed on a case-by-case basis. In order to help a client formulate the acquisition strategy that works best for that client's particular needs, we generally will prepare a takeover analysis, which consists of a review of publicly available documents and a written summary of salient legal issues. Attached as Annex A is a comparative timeline setting forth certain relevant steps in the timing of a cash tender offer, an exchange offer and a merger.

Please do not hesitate to contact any of us if you have any further questions or comments about the foregoing.

Endnotes

[1] An acquirer can utilize a broad range of approaches to a potential target, which range in “hostility” from approaching the target’s board of directors in a friendly manner to launching a tender offer without notifying the target or its board. When making this decision, the acquirer’s legal and financial advisors will provide analysis of the strategic implications of each approach. Notably, in most circumstances, hostile offers serve as a means to bring a target to the bargaining table, rather than as the ultimate means of acquiring a target company.

[2] In a transaction in which the consideration consists in whole or in part of acquirer securities, the acquirer would also make representations in the merger agreement. Notably, the more equal in size the acquirer and the target are, the more appropriate it is for the parties’ representations and warranties to mirror each other.

[3] Mergers are primarily regulated by the SEC through the proxy rules pursuant to Section 14(a) of the Exchange Act and Regulation 14A thereunder. When the consideration includes acquirer securities, mergers also are governed by the Securities Act. The required disclosure in a cash merger is set forth in Schedule 14A, the required disclosure for a non-US acquirer in merger that includes acquirer securities as consideration is set forth in the Registration Statement on Form F-4 and the required disclosure for a US acquirer in merger that includes acquirer securities as consideration is set forth in the Registration Statement on Form S-4.

[4] One such exception, which is provided for in several US states’ corporate laws, including Delaware, provides that shareholders of a publicly traded target corporation with stock held of record by more than 2000 shareholders will not be entitled to appraisal rights in transactions in which the consideration to be received by those target shareholders consists solely of the securities of the acquirer. This exception only applies when the acquirer is also a large, publicly traded corporation with stock held of record by more than 2000 shareholders.

[5] In 2014, approximately five percent of US public company merger agreements for transactions over US$100 million included so-called “dissenting shareholder” provisions Source: FactSet MergerMetrics.

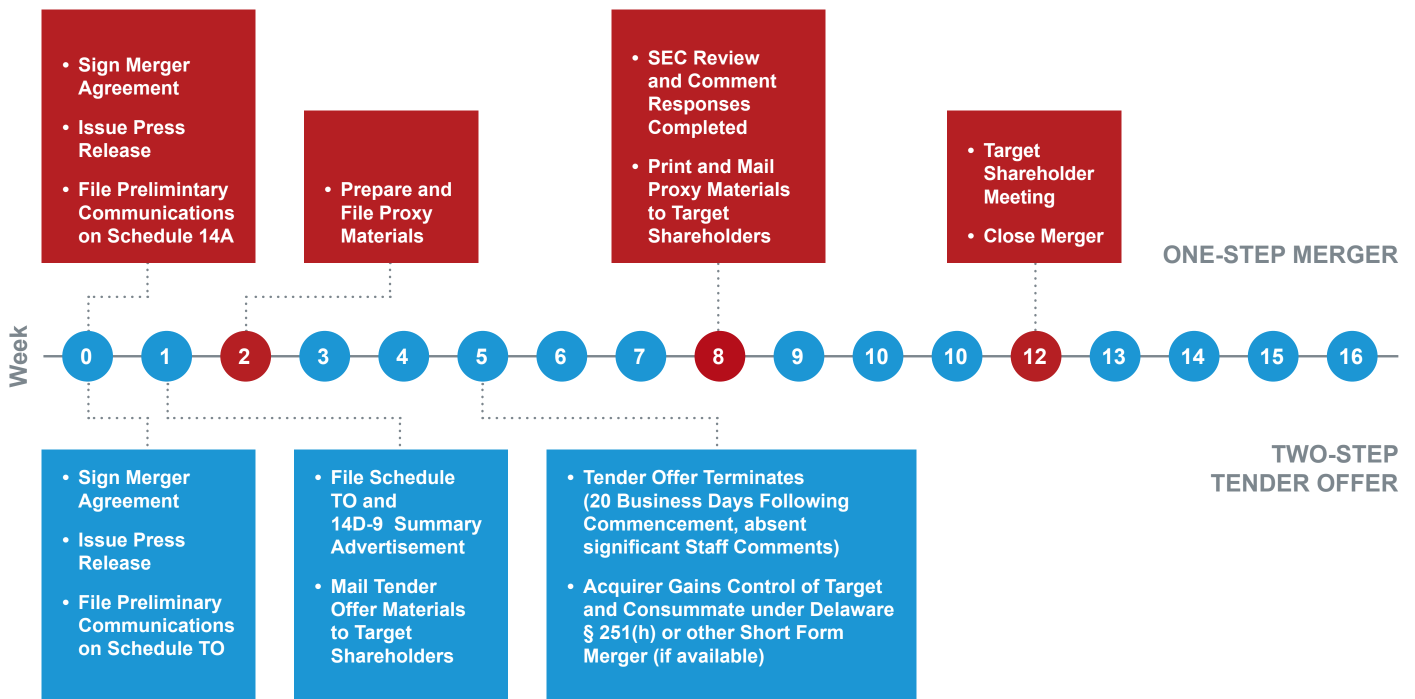
[6] Tender offers are governed by Section 14(d) of the Exchange Act and Regulations 14D and 14E promulgated thereunder. Exchange offers are further regulated by the stock issuance rules under the Securities Act. The detailed requirements of the disclosure required in an Offer to Purchase and Exchange Offer/ Prospectus are set forth in the instructions and items of Schedule TO, the requirements and disclosure required for a non-US acquirer to register its shares for exchange are set forth in the instructions to Form F-4, and the requirements and disclosure required for a US acquirer to register its shares for exchange are set forth in the instructions to Form S-4. During the period after the public announcement and prior to the commencement of the offer, all written communications regarding the offer must be separately filed on Schedule TO on the date first used.

[7] This time period is dictated by Regulation 14E promulgated under the Exchange Act.

[8] Note that in certain regulated industries, the regulatory approval process may take longer than the SEC review and shareholder approval process required in a one-step merger, eliminating the timing advantage of using the two-step structure (see “Expected Extended Regulatory Review: One-Step Structure Preferred”).

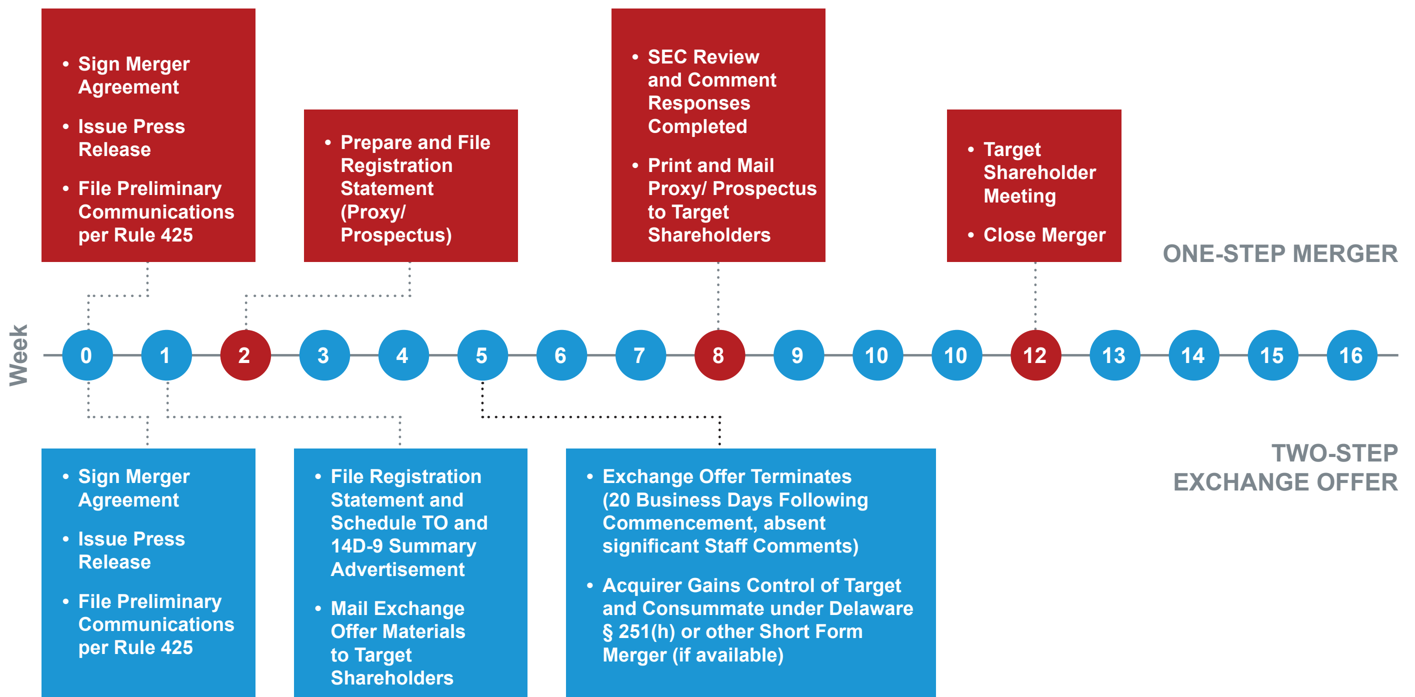
ANNEX A

ILLUSTRATIVE TIMELINE – PUBLIC CASH TRANSACTIONS



Note: Assumes no antitrust or other regulatory delay.

ILLUSTRATIVE TIMELINE – PUBLIC STOCK TRANSACTIONS



Note: Assumes no antitrust or other regulatory delay, and no acquirer shareholder approval required.

Abu Dhabi
Al Sila Tower, Level 14
Sowwah Square
PO Box 106076
Abu Dhabi, United Arab Emirates
Tel: +971.2.813.4800
Fax: +971.2.813.4999

Barcelona
Avenida Diagonal 477,
10th Floor
08036 Barcelona,
Spain
Tel: +34.93.545.5000
Fax: +34.902.882.2287

Beijing
Unit 2318, China World Trade Office 2
1 Jian Guo Men Wai Avenue
Beijing 100004
People's Republic of China
Tel: +86.10.5965.7000
Fax: +86.10.5965.7001

Boston
John Hancock Tower,
27th Floor
200 Clarendon Street
Boston, MA 02116
USA
Tel: +1.617.948.6000
Fax: +1.617.948.6001

Brussels
Boulevard du Régent, 43-44
B-1000, Brussels,
Belgium
Tel: +32.2.788.6000
Fax: +32.2.788.6060

Century City
10250 Constellation Blvd
300
Los Angeles, CA 90067
USA
Tel: +1.424.653.5500
Fax: +1.424.653.5501

Chicago
330 North Wabash Avenue,
Suite 2800
Chicago, IL 60611
USA
Tel: +1.312.876.7700
Fax: +1.312.993.9767

Doha
Qatar Financial Centre Branch, licensed by the QFCA
Alfardan Office Tower Level 17, West Bay
P.O. Box 23845
Doha, Qatar
Tel: +974.4406.7700
Fax: +974.4406.7799

Dubai
Dubai International Financial Centre
Precinct Building 1, Level 3
P.O. Box 506698
Dubai, United Arab Emirates
Tel: +971.4.704.6300
Fax: +971.4.704.6499

Dusseldorf
Dreischeibenhaus 1
40211 Düsseldorf
Germany
Tel: +49.69.6062.6000
Fax: +49.69.6062.6700

Frankfurt
Reuterweg 20
60323 Frankfurt am Main
Germany
Tel: +49.69.6062.6000
Fax: +49.69.6062.6700

Hamburg
Warburgstrasse 50
20354 Hamburg
Germany
Tel: +49.40.4140.30
Fax: +49.40.4140.3130

Hong Kong
18th Floor, One Exchange Square
8 Connaught Place, Central
Hong Kong
Tel: +852.2912.2500
Fax: +852.2912.2600

Houston
811 Main Street
Suite 3700
Houston, TX 77002
USA
Tel: +1.713.546.5400
Fax: +1.713.546.5401

London
99 Bishopsgate
London, EC2M 3XF
England
Tel: +44.20.7710.1000
Fax: +44.20.7374.4460

Los Angeles
355 South Grand Avenue
Los Angeles, CA 90071
USA
Tel: +1.213.485.1234
Fax: +1.213.891.8763

Madrid
María de Molina 6, 4th Floor
28006 Madrid,
Spain
Tel: +34.91.791.5000
Fax: +34.902.882.228

Milan
Corso Matteotti, 22
20121 Milano
Italy
Tel: +39.02.3046.2000
Fax: +39.02.3046.2001

Moscow
Ulitsa Gasheka, 6, Ducat III, Office 510
Moscow 125047
Russia
Tel: +7.495.785.1234
Fax: +7.495.785.1235

Munich
Maximilianstrasse 13
80539 Munich
Germany
Tel: +49.89.2080.3.8000
Fax: +49.89.2080.3.8080

New Jersey
One Gateway Center, 11-43 West Raymond Plaza, Suite 2600
Newark, NJ 07102
USA
Tel: +1.973.639.1234
Fax: +1.973.639.7298

New York
885 Third Avenue
New York, NY 10022-4834
USA
Tel: +1.212.906.1200
Fax: +1.212.751.4864

Orange County
650 Town Center Drive
20th Floor
Costa Mesa, CA 92626-1925
USA
Tel: +1.714.540.1235
Fax: +1.714.755.8290

Paris
45, rue Saint-Dominique
Paris 75007
France
Tel: +33.1.4062.2000
Fax: +33.1.4062.2062

Riyadh
7th Floor, Tower 1,
Al-Tatweer Towers
King Fahad Highway
PO Box 17411
Riyadh 11484
Saudi Arabia
Tel: +966.1.207.2500
Fax: +966.1.207.2577

Rome
Via del Corso 63
00186 Rome
Italy
Tel: +39.06.98.95.6700
Fax: +39.06.98.95.6799

San Diego
12670 High Bluff Drive
San Diego, CA 92130
USA
Tel: +1.858.523.5400
Fax: +1.858.523.5450

San Francisco
505 Montgomery Street, #2000
San Francisco, CA 94111-6538
USA
Tel: +1.415.391.0600
Fax: +1.415.395.8095

Shanghai
26th Floor, Two ifc,
8 Century Boulevard,
Shanghai 200120
People's Republic of China
Tel: +86.21.6101.6000
Fax: +86.21.6101.6001

Silicon Valley
140 Scott Drive
Menlo Park, CA 94025
USA
Tel: +1.650.328.4600
Fax: +1.650.463.2600

Singapore
9 Raffles Place
#42-02 Republic Plaza
Singapore, 048619
Singapore
Tel: +65.6536.1161
Fax: +65.6536.1171

Tokyo
Marunouchi Building
32nd Floor
2-4-1 Marunouchi,
Chiyoda-ku, Tokyo 100-6332
Japan
Tel: +81.3.6212.7800
Fax: +81.3.6212.7801

Washington, D.C.
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
USA
Tel: +1.202.637.2200
Fax: +1.202.637.2201

LW.com

Abu Dhabi
Barcelona
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* In association with the Law Office of Salman M. Al-Sudairi

LATHAM & WATKINS LLP