

A chessboard with a king piece in the center, surrounded by other pieces like pawns, knights, and bishops. The board is set on a checkered surface.

Morgan Lewis

M&A ACADEMY PUBLIC COMPANY M&A - PART I AN OVERVIEW

Andrew R. Mariniello
Colby W. Smith
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General Introduction

- Introduction of speakers
- Scope of today's presentation
- Preview for Part II
 - February 6, 2018
 - Richard Aldridge and Robert Dickey
 - Target Board Considerations
 - Fiduciary Duties and Standards of Review

Today's Presentation

- General Introduction
- Comparison of Public v. Private M&A
- Buyer's Initial Diligence Activities
- General Overview of Transaction Structures
- Typical Merger Agreement Provisions
- Litigation Risk / Appraisal Rights
- Questions

Comparison of Public v. Private M&A

- Buyer's acquisition of publicly traded securities
 - Enhanced pre and post-signing considerations
- Publicly available information
- Privity of contract
 - In general, Buyer does not gain contractual privity with parties that will receive consideration
- Indemnity/post-closing obligations
- Nature of representations and warranties
- Nature of closing conditions
- Public shareholder approval / tender process, filed with SEC
- Application of "fiduciary out"
- Enhanced consideration of potential transaction failure

Buyer's Initial Diligence

- Due Diligence (Using SEC Filings/Public Information)
 - Review Target Charter and Bylaws
 - Poison Pill; Classified Board
 - Supermajority Votes; Preferred or Super Voting Stock
 - Change of Control Provisions in Material Contracts
 - Analyze Stockholder Base – Controlling Interest/Large Holders
 - Share Price Trading History
 - Analyze State Law Requirements or Potential Deal Impediments

Transaction Structures

Two Primary Acquisition Structures:

- Merger (One Step)
- Tender Offer (Two Step)
 - Negotiated
 - Hostile
 - Followed by Second-Step “Freeze Out” Merger
- Consideration
 - All Cash or All Stock
 - Fixed Combination of Cash and Stock
 - Cash and Stock Election
 - Contingent Value or Contingent Payment Rights
- Asset Sales

One-Step Merger vs. Tender Offer

- One-Step Merger Pros and Cons
 - When Closed, Buyer Owns 100% of the Target
 - Target Required to Convene a Stockholder Meeting; Receive Requisite Vote
 - Can Take Longer Than Tender Offer
- Tender Offer Pros and Cons
 - May Close More Quickly Than a One-Step Merger
 - Back-End Merger Can Be Facilitated
 - “Top Up” Option
 - 251(h) Merger in Delaware
 - Hostile Tender Offer Does Not Require Target Board Approval (Absent a Poison Pill)
 - Hostile Tender Offer May Be Expensive, Time Consuming, and Less Certain of Success

Merger vs. Tender Offer (cont.)

Transaction Structure (Assumes All Cash Transaction)	Two-Step Tender Offer	One-Step Merger
Approximate Overall Timing	<ul style="list-style-type: none"> Two to three month process 	<ul style="list-style-type: none"> Two to five month process (dependent on SEC review of proxy)
Advantages	<ul style="list-style-type: none"> Quicker path to control of Target than one-step (reduces risk of competing offer) SEC is committed to expedited review Able to avoid a stockholders meeting and proxy solicitation 	<ul style="list-style-type: none"> Able to complete transaction in one step with only 51% of Target stockholders voting in favor of transaction Does not require registration of Bidder shares Extended period between signing and closing to obtain any required consents (e.g., regulatory approval) or buyer financing
Disadvantages	<ul style="list-style-type: none"> Shorter time period between signing and closing to obtain any required consents (e.g., regulatory approval) or buyer financing Tender can't close until all conditions are satisfied 	<ul style="list-style-type: none"> Slower path to control of Target (extends risk of competing offer) SEC is not committed to expedited review
Procedure		
Weeks 1-3	<ul style="list-style-type: none"> Due Diligence and Execution of Merger Agreement 	<ul style="list-style-type: none"> Due Diligence and Execution of Merger Agreement
Weeks 4-5	<ul style="list-style-type: none"> Prepare SEC filings (1-2 weeks) <ul style="list-style-type: none"> Schedule TO Parties file HSR materials with DOJ or FCC 	<ul style="list-style-type: none"> Prepare SEC filings (1-2 weeks) <ul style="list-style-type: none"> Proxy Statement Parties file HSR materials with DOJ or FCC
Weeks 5-9	<ul style="list-style-type: none"> Commence Tender Offer (must remain open for longer of 20 business days or SEC approval of filing) HSR waiting period expires (15 days if no second request) SEC review process (3-4 weeks) Close Tender Offer Close Short-form Merger 	<ul style="list-style-type: none"> SEC to confirm no review of proxy (2-4 weeks) If SEC review (add 4-8 weeks) HSR waiting period expires (30 days if no second request) If no SEC review, mail proxy statement and solicit proxies (4 weeks) If no SEC review, conduct Special Meeting and close transaction
Weeks 9-21		<ul style="list-style-type: none"> If SEC review, parties reconcile comments and amend proxy (add 4-8 weeks) Mail proxy statement and solicit proxies (4 weeks) Conduct Special Meeting and close transaction

Merger Communications

- Similar to Company's Annual Shareholder Meeting Process
 - Convene a meeting (record date, etc.)
 - File Proxy Statement with SEC
 - SEC may review Proxy Statement
- Company Recommendation
 - Target Board Must Make Recommendation to Stockholders
- Approval Standard (State Law plus Target's Charter)
- If Stockholder Approval Necessary, Generally May Require Proxy Solicitation
- If Sufficient Share Ownership Concentration and State Law Requirements, Can Approve by Written Consent

Tender Offer Communications

- Commencing the Tender Offer
 - Commenced with a “Tombstone Ad” Containing Material Terms
- Buyer Filing – Schedule TO – Tender Offer Statement
 - Includes Terms of Offer and SEC Required Disclosures About Offeror, Target, and the Offer
 - Incorporates by Reference the Bidder's “Offer to Purchase”
- Company Filing - Schedule 14d-9 – Solicitation/Recommendation Statement
 - Target Board Must Make Recommendation to Stockholders Within 10 Business Days — Accept, Reject or Unable to Take a Position
 - Typically Filed at Same Time as Schedule TO in Friendly Transaction
- SEC May Review Tender Filings

Tender Offer Basics

- Offer Must Remain Open at Least 20 Business Days
- May Offer All Cash, All Stock or Fixed Combination or Choice
 - If Limit on Amount of Cash or Stock, Must Prorate
- Must Offer to All Holders of the Same Class of Security at the Same Price
- If Offeror Changes Percentage of Securities Sought or Consideration Offered, Offer Must Be Open at Least 10 Business Days After Changes
- Other Changes (Including Waiving Tender Offer Conditions) Require Five-Business-Day Extension
- Offeror May Extend Offer Period
 - Public Announcement on First Business Day Following Expiration by Earlier of 9:00 a.m. EST or Opening of Stock Exchange
- Buyer Must Promptly Accept and Pay for, or Return, All Securities Tendered Following Termination or Expiration of Offer
- Subsequent Offering Period OK if Original Offer Was for All Shares and Consideration Is Same Type and Amount as Original Offer

Tender Offer — Back End Merger

- Short-Form Merger – if Acquire 90%+ of Shares in Tender Offer or through Top-Up Option, Can Complete Merger Without Vote of Other Shareholders, Although Still Requires Information Statement
- A “Top-Up” Option No Longer Needed in Delaware if Satisfy Requirements under DGCL 251(h), including:
 - Target’s Stock Must Be Listed on National Stock Exchange or Held of Record by More Than 2,000 Holders
 - Agreement of Merger Expressly Permits or Requires the Merger To Be Effected Under 251(h) and Provides that the Merger Will Happen as Soon as Practicable Following Tender Offer Completion
 - The Tender Offer Is for “Any and All” Shares
 - The Buyer Holds Enough Stock After the Tender Offer to Adopt the Merger

Other SEC Filing Considerations

- If Securities Are to Be Issued as Consideration, Must Be Registered
 - Form S-4 Registration Statement for Registration of Securities to Be Issued in Connection with Business Combination Transaction
 - Can Combine S-4/Proxy Statement or Structure as an Exchange Offer
 - Contingent Value or Contingent Payment Rights May Require Registration
 - No Registration if (i) Integral Part of Consideration, (ii) No Rights of a Stockholder Like Voting or Dividend Rights, (iii) No Minimum Payment or Interest Rate, (iv) Not Transferable or Assignable, or (v) Not Certificated

Typical Public Company Merger Agreement Provisions

- Consideration
 - Stock Consideration Generally Valued Based on a Volume Weighted Average Price, and May Include Collars
 - Payment Terms for Options, SARs, Warrants, and Different Classes of Stock
 - Consideration May Include Contingent Value or Contingent Payment Rights
 - Bridge Transaction Value Gaps – Particularly if Future Events May Impact Value (e.g., FDA Approvals, Outcome of Pending Litigation, etc.)
- Reps and Warranties
 - Typically Incorporate Information from Public Filings
 - Don't Survive the Closing – Useful for Disclosure, and Confirming Due Diligence, and May Allow Buyer Not to Close if Extreme Unanticipated Problems (i.e., MAC/MAE)
 - Generally “Brought Down” at Closing Against an Overall Material Adverse Change/Material Adverse Effect Standard

Typical Public Company Merger Agreement Provisions (cont.)

- Covenants
 - General “Conduct of the Business” Covenants to Operate in the Ordinary Course and to Do or Refrain from Doing Certain Specified Activities
 - Antitrust “Gun Jumping” Considerations
 - Obtain Necessary Third-Party Consents and Approvals
 - May Require Cooperation With Buyer’s Financing Efforts
 - Mutual Cooperation With Proxy and Registration Statement Filings and Solicitation of Stockholder Votes
 - May Include a “Force The Vote” Provision
 - Target has to put transaction to a stockholder vote, even if another transaction has been proposed or Board recommendation has changed
 - May Require Specific Actions to Obtain Antitrust or Other Approvals
 - Commercially Reasonable Efforts
 - “Hell or High Water”
 - Other Covenants Specific to the Companies/Circumstances

Typical Public Company Merger Agreement Provisions (cont.)

Deal Protection Provisions

- Target Non-Solicitation Structure
 - No Shop vs. Go Shop vs. Window Shop
 - Buyer Matching Rights
 - Intervening Event
- Termination Fees/Expense Reimbursement
 - Compensates Initial Buyer if Another Buyer Tops the Deal
 - Reverse Break Fee for Antitrust or Other Regulatory Risk or Lack of Financing

Typical Public Company Merger Agreement Provisions (cont.)

- Closing Conditions (Merger Closing and Tender Closing)
 - Stockholder Approval (if necessary)
 - Regulatory and Third Party Approvals
 - Typically no required 3rd Party contract consents condition
 - No Injunction or Other Legal Impediment to Closing
 - Buyer and Target Representations and Warranties True and Correct (Usually Against an Aggregate MAC/MAE Standard For Target Reps)
 - Buyer and Target Covenants Performed in All Material Respects
 - Absence of MAC/MAE
- Tender Offer Back-end Merger Usually has Minimal Conditions

Typical Public Company Merger Agreement Provisions (cont.)

Termination of Agreement:

- By Mutual Consent
- By Either Party if:
 - Merger Doesn't Close By Specific Outside Closing Date
 - Injunction or Other Legal Prohibition On Closing
 - Stockholders Don't Approve Merger

Typical Public Company Merger Agreement Provisions (cont.)

- Buyer Termination:
 - Target Board Changes or Fails to Reaffirm Recommendation of Initial Buyer Transaction, Commencement of a Third Party Tender Offer Not Opposed By Target Board, Breach of No-Solicit Covenants
 - Breach of Target Reps, Warranties or Covenants Resulting in Failure of Closing Condition (Often Subject to a Cure Right)
- Target Termination:
 - Fiduciary Out – Ends at Stockholder Approval / Closing of Tender
 - Breach of Buyer Reps, Warranties or Covenants Resulting in Failure of Closing Condition (May Be Subject to a Cure Right)

Typical Public Company Merger Agreement Provisions (cont.)

Effects of Termination

- No Termination/Break Fee Paid if:
 - Mutual Termination
 - No Closing By Outside Closing Date (Subject to Tail)
- Termination/Break Fee (Which May Include Expense Reimbursement) Paid if:
 - Change or Failure to Reaffirm Target Board Recommendation
 - Commencement of Tender Offer Not Opposed By Target Board
 - Breach of No-Solicit Covenants
 - Target Terminates to Accept Another Deal (Typically a Reduced Fee if Termination Happens During Go Shop Period)
- Naked No Vote
- Reverse Termination/Break Fee Paid for Failure of Buyer to Close due to Absence of Financing or if Buyer Exercises Unilateral Termination Right

Termination Fees

- Typically based on a percentage of Equity Value
- Target Break-Up Fees
 - Size limited by case law (can't coerce the vote)
 - 2016 average fee size 3.39%
- Reverse Break-Up Fees
 - More flexibility on size (typically larger than target break-up fees)
 - Financing Failure
 - General Breaches of Reps & Covenants
 - Antitrust Failure

Other Transaction Considerations

- Stockholder Support Agreements/Voting Agreements
- Post Merger Governance Considerations
 - Especially meaningful in Merger of Equals
- Regulatory Approvals
 - Hart-Scott-Rodino
 - Exon-Florio/CFIUS – If Acquirer is a Foreign Person and the Acquisition Could Implicate National Security – Broadly Construed
 - SEC
 - Securities Registration
 - Tender Offer and/or Proxy Solicitation Filings
 - Industry-Specific Regulatory Approvals
 - Foreign Regulatory Approvals - Cross-Border Transaction

M&A Litigation Risk / Appraisal Rights

- Buyers Can Be Named on an “Aiding And Abetting” Theory
- Buyer Will Inherit Whatever Litigation Results From The Acquisition
- Target Boards in Recent Years Have Been Sued in Overwhelming Majority of Public Company Deals:
 - May Face Lawsuits in Jurisdiction of Organization and in Jurisdiction Where Headquarters or Significant Operations Are Located
 - Exclusive Forum Bylaws – Requires Litigation Regarding Internal Affairs/Stockholder Claims Only in One Jurisdiction (e.g. Delaware Courts). Delaware Prohibits Litigation Fee Shifting Bylaws
- Most Litigation Settled – Sometimes With Additional Disclosures (But Delaware Courts Are Becoming Less Willing To Go Along With “Disclosure Only” Settlements)
- Most States Include Dissenters’ Rights or Appraisal Rights Statutes
 - Stockholders Who Did Not Vote For a Merger But Held Shares At The Time of The Merger Can Ask a Court to Determine The “Fair Value” of Their Shares
 - Value Can Be Higher, Lower or The Same As Was Paid in The Transaction
 - No Value is Generally Attributed to The Completion or Expectation of The Merger (i.e. The Value of The Stock Ignores Any Effect of The Transaction Itself)

QUESTIONS?

Biographies



Andrew R. Mariniello counsels clients on a wide variety of business law matters, with an emphasis on advising public and private companies and private equity firms in domestic and cross-border mergers and acquisitions, as well as general corporate and securities law matters. Andrew has represented private equity firms, venture capital investors, and privately held companies in early stage and follow-on investments.

Andrew has helped clients navigate complex deals ranging in value from millions to billions across a wide variety of industries—including energy, life sciences, technology, manufacturing, and financial services. In addition, he has counseled public and private companies on corporate governance and transactional matters.



Colby W. Smith counsels clients in business law matters, with an emphasis on public and private merger and acquisition transactions and securities and investment transactions. He represents seed, institutional, and strategic investors in investment and portfolio company transactions.

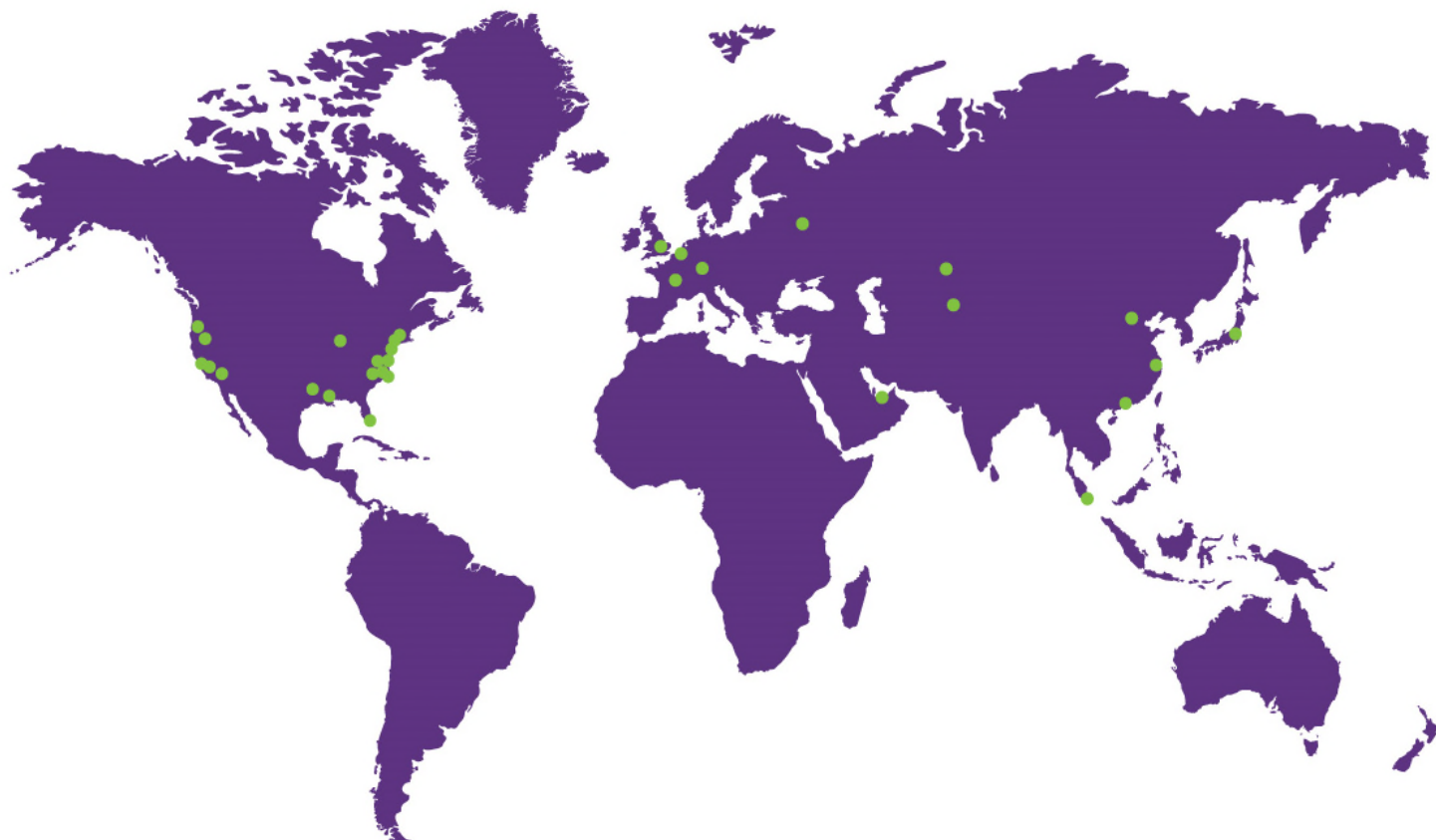
Colby also focuses on counseling public and private Pennsylvania registered corporations on corporate governance and transactional matters. He represents clients in a variety of industries, including technology, healthcare, manufacturing, aerospace and defense, retail, and consumer products.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	London	Paris	Shanghai*
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