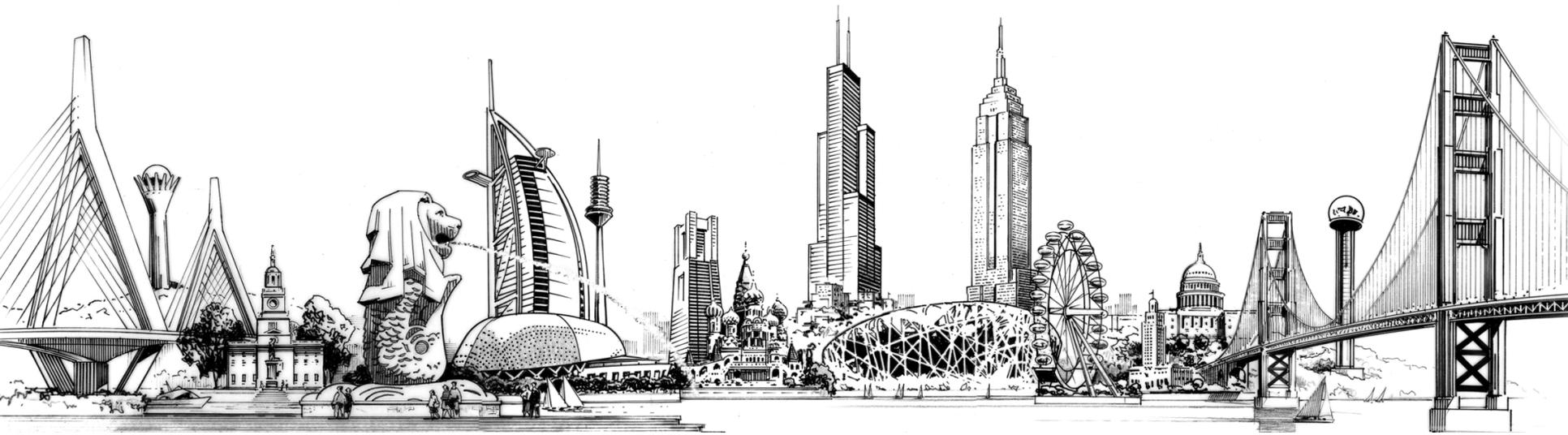


Morgan Lewis

M&A ACADEMY

CHOOSING AN ACQUISITION STRUCTURE AND STRUCTURING A DEAL



Agenda

- Overview of the Acquisition Process
- Basic Forms of Acquisitions
- Basic Issues To Consider In Structuring The Deal
- Select Public Company Issues
- Considerations in Selecting Form of Acquisition
- Hypothetical Facts

Overview of the Acquisition Process

I. Role of Lawyer:

- If representing Buyer, advice on structuring and go/no go decision
- If representing Seller, advice on sale process and deal structure, and possibly evaluating bids from multiple Buyers
- Due diligence
- Negotiation and documentation
- Getting to closing

Practice Tip: At the beginning of every proposed deal, ask the following questions:

- Is there a confidentiality agreement in place?
- Is there a letter of intent, term sheet or even exchanges of emails on proposed terms?
- Has a structure for the deal been selected? If so, why?
- For a Buyer, who else is competing to buy this business?
- For a Seller, what alternatives are there rather than this proposed Buyer or this proposed deal?

Overview of the Acquisition Process (cont'd.)

II. Motivations of Buyer and Seller:

- **Practice Tip** – at the beginning of every deal, spend a little time thinking through why each side is pursuing the transaction, and their key motivations:
 - Motivations For My Side
 - What does my client hope to get out of this?
 - What is my client worried about?
 - When does my client want to do this?
 - What is the proposed process for getting to a signed deal?
 - Motivations For The Other Side
 - Why is the other side selling (or buying)?
 - What does the other side hope to get out of this?
 - What is the other side worried about?
 - When does the other side want to do this?
 - What is the proposed process for getting to a signed deal?

Overview of the Acquisition Process (cont'd.)

III. Typical Acquisition Process

- Process can be different for different types of deals
 - Bilateral negotiations
 - Informal “auction” process with multiple bidders
 - Bankruptcy sale
 - Public target v. private target
- Common Elements:
 - Identification of parties
 - Preliminary discussions
 - Confidentiality agreement
 - Letter of Intent (maybe) or Term Sheet
 - Due diligence
 - Negotiation of terms and documentation
 - Execution of documents
 - Period between signing and closing (if applicable)
 - Closing
 - Resolution of post-closing issues

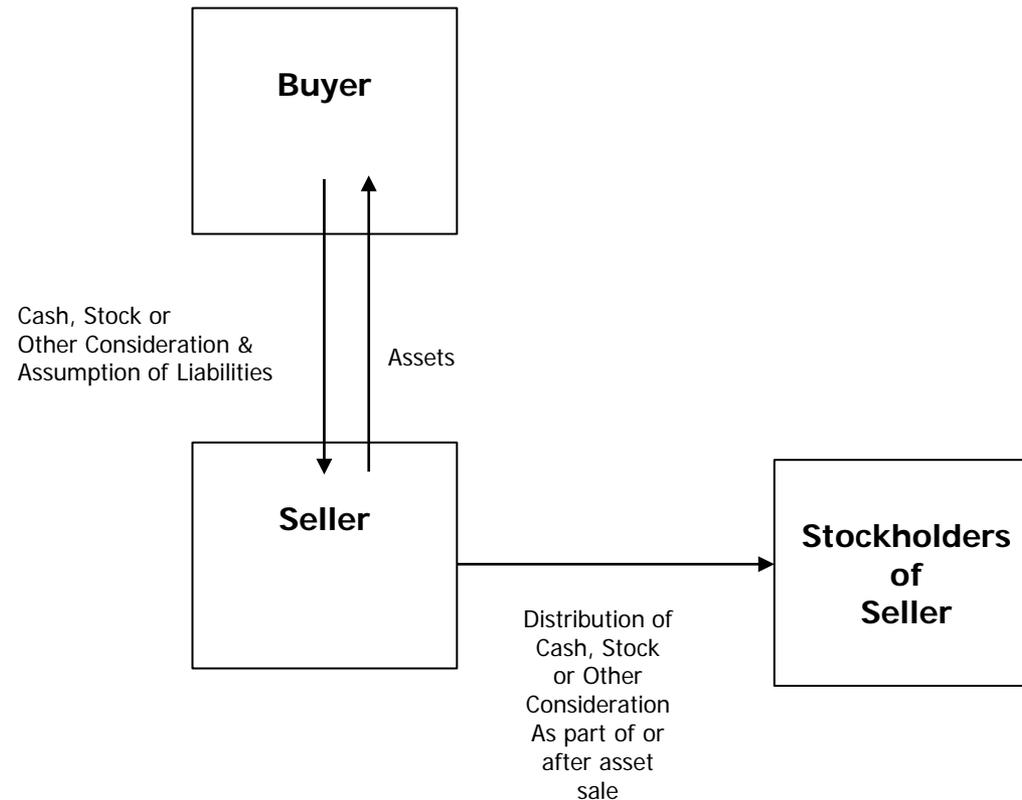
Basic Forms of Acquisitions

A. Acquisition of Assets

- Buyer, or subsidiary of Buyer, acquires assets of Seller for stock of Buyer, cash or other consideration and the assumption of none, some or all of the related liabilities of Seller
- Completed through asset acquisition agreement
 - negotiate directly with Seller's management
 - ability to specify assumed and excluded assets
 - ability to specify assumed and excluded liabilities
 - only agreed-upon assets and liabilities to be transferred to Buyer
- Seller survives acquisition holding:
 - excluded assets
 - excluded liabilities and
 - unless distributed to Seller's creditors or stockholders, the cash, stock or other items paid as consideration

Basic Forms of Acquisitions (cont'd)

Acquisition of Assets



Basic Forms of Acquisitions (cont'd)

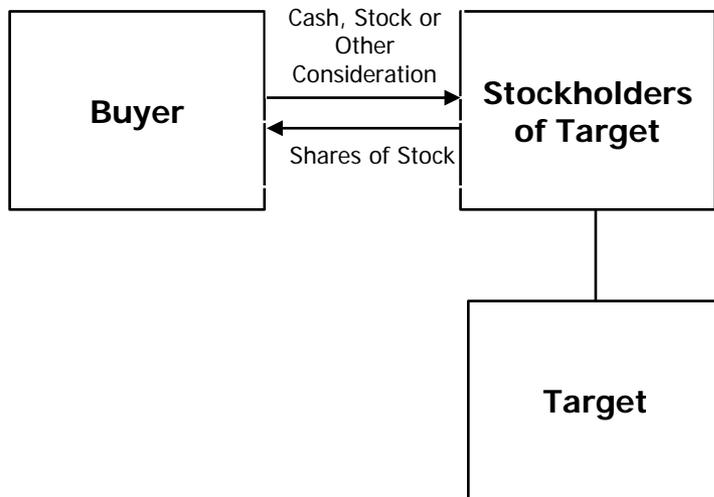
B. Acquisition of Stock

- Buyer acquires Seller's outstanding stock from the stockholders of Seller for stock of Buyer, cash or other consideration
- Completed through stock purchase agreement
 - negotiate directly with Seller's stockholders
 - may acquire 100% of outstanding shares or less – most Buyers want 100% ownership
 - Seller continues to hold all of its assets and liabilities both before and after the transaction – now has different stockholder(s)

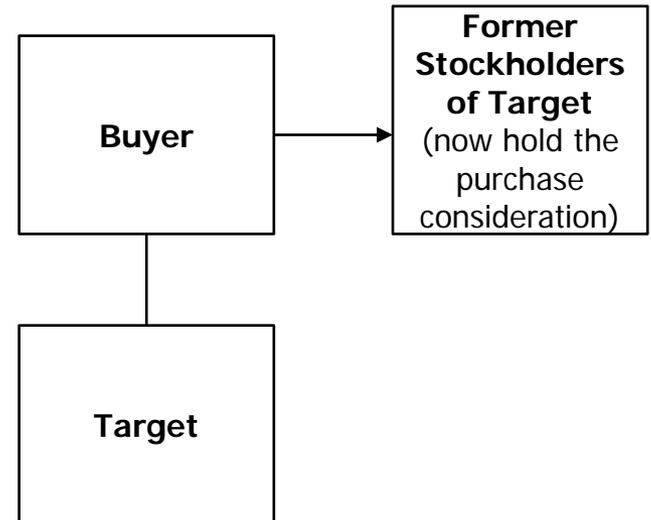
Basic Forms of Acquisitions (cont'd)

Acquisition of Stock

Before:



After:



Basic Forms of Acquisitions (cont'd)

C. Merger

- Three basic structures, all of which involve statutory mergers in which Target's outstanding stock is converted into the right to receive stock of Buyer, cash or other consideration:

Straight Merger:	<ul style="list-style-type: none">• Target merges into Buyer, with Buyer as surviving corporation• Note: requires approval of Buyer's stockholders (as well as Target's stockholders)
Reverse Triangular Merger:	Subsidiary of Buyer merges into Target with Target as surviving corporation
Forward Triangular Merger:	Target merges into Subsidiary of Buyer, with Subsidiary as surviving corporation

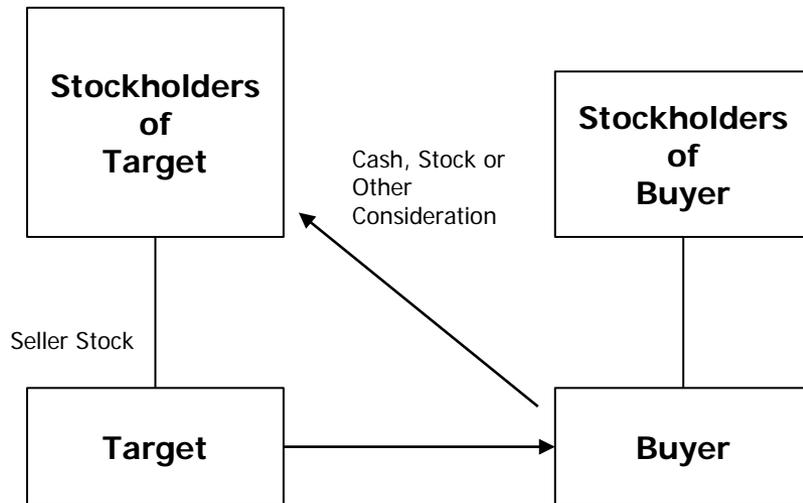
Basic Forms of Acquisitions (cont'd)

- Completed through merger agreement
 - specific terms of merger negotiated with Target's management or stockholders
 - merger occurs by operation of state law for the jurisdiction(s) where the merging entities are organized
 - surviving corporation - one of the constituent corporations survives the merger
 - surviving corporation - succeeds to all assets and liabilities of the constituent corporations
- Must comply with the state law merger statutes
- Merger Statute
 - Delaware General Corporation Law ("DGCL") §§251-271

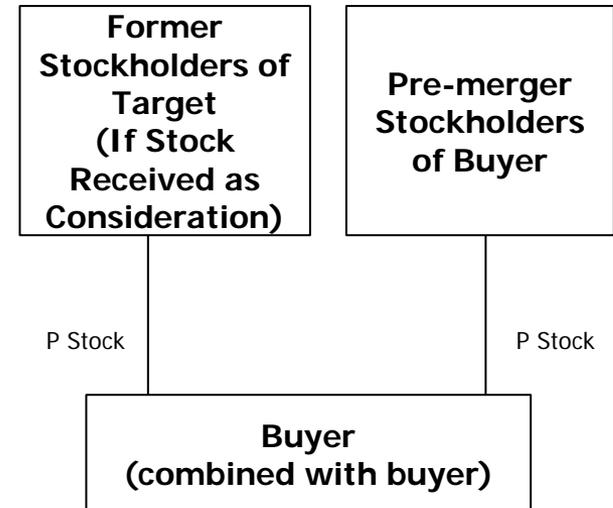
Basic Forms of Acquisition (cont'd)

Straight Merger

Before:



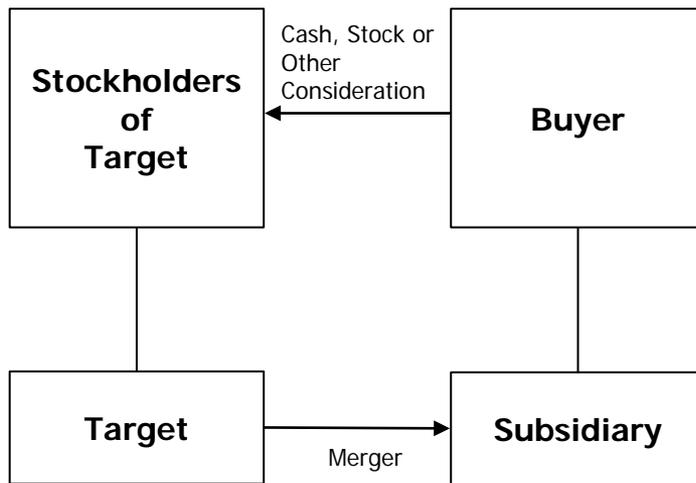
After:



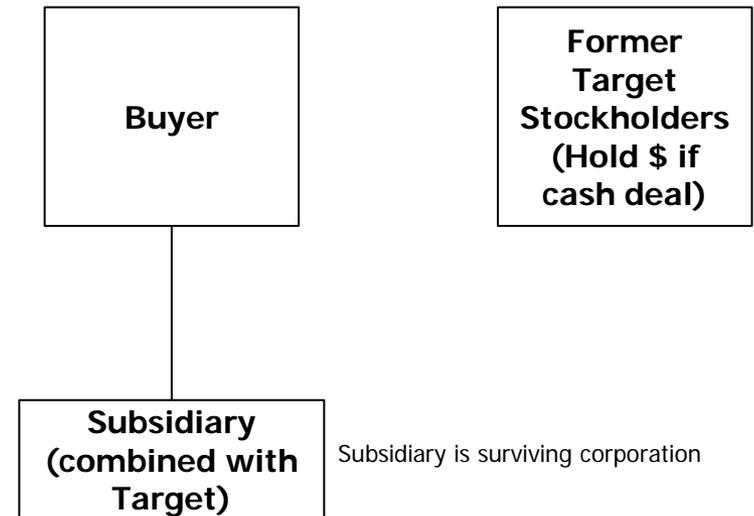
Basic Forms of Acquisition (cont'd)

Forward Triangular Merger

Before:



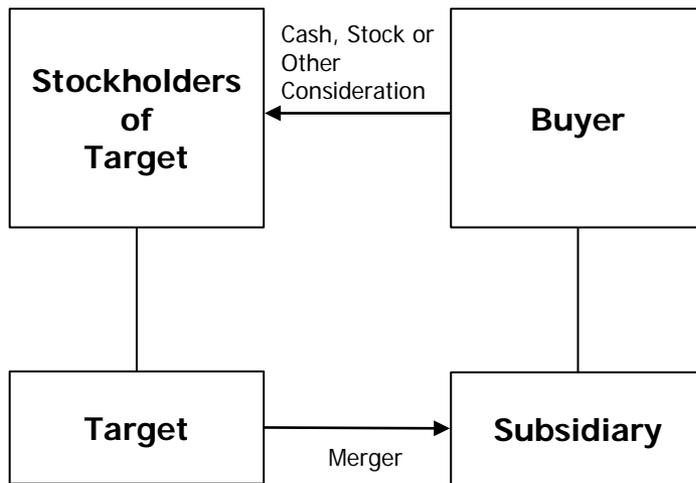
After:



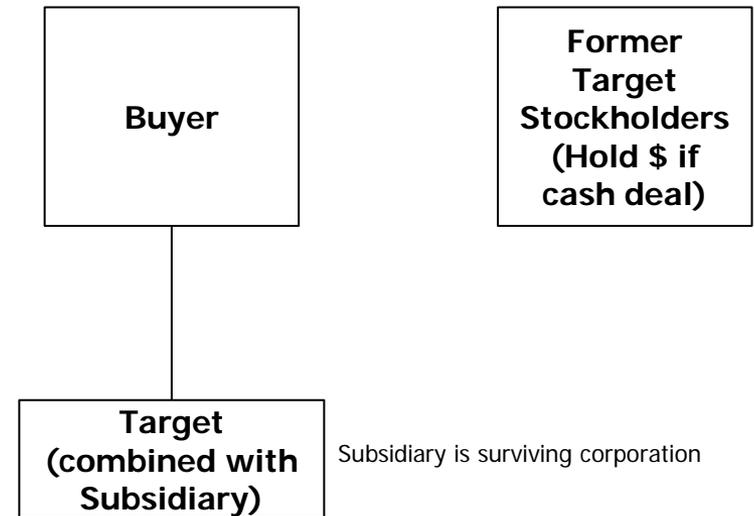
Basic Forms of Acquisition (cont'd)

Reverse Triangular Merger

Before:



After:



Basic Issues to Consider in Structuring the Deal

Pros and Cons to Asset Acquisition Structure

- Buyer
 - Can pick and choose specific assets and liabilities
 - No money wasted on unwanted assets (but may inadvertently fail to purchase an important asset)
 - Lower risk of assuming unknown or undisclosed liabilities – but see Practice Tip below
 - Often better tax treatment than stock acquisitions
- Seller
 - Left with known/unknown liabilities not assumed
 - Often better tax treatment when selling stock
 - More complicated - assigning specific assets
 - More time consuming - third party consents
- **Practice Tip** - If representing the Buyer in an asset acquisition, can't assume that Buyer has no risk with respect to unassumed liabilities. Among other things, need to address potential types of liabilities that raise successor liability issues (for example, product liability) and any fraudulent conveyance risks.

Basic Issues to Consider in Structuring the Deal

Pros and Cons to Stock Acquisition Structure

- Buyer
 - Cannot pick and choose specific assets and liabilities – will assume all liabilities (known and unknown)
 - Often worse tax treatment than sale of assets
- Seller
 - Not left with any contingent liabilities
 - Often better tax treatment than sale of assets
- Not practical if the Target has large number of stockholders - all must agree to sell - negotiations can be time consuming
- Few statutory requirements for negotiated stock sales

Basic Issues to Consider in Structuring the Deal

Pros and Cons to Merger Structure

- Buyer
 - Cannot pick and choose specific assets and liabilities - assume all liabilities (known and unknown)
- Seller
 - Not left with any contingent liabilities
- Typically only majority consent of Target stockholders required -- very effective way of completing acquisition of a Company with a large number of stockholders
- Numerous third party consents may be required if Target merged out of existence
- Appraisal rights may apply
- **Practice Tip** – Need to be mindful of issues raised in Cigna case.

Cigna v. Audax

- It has been a common practice for acquisitions of private companies with a large number of stockholders to structure the transaction as a merger, with all or part of the merger consideration being subject to an indemnity by the Target stockholders, who may or may not be parties to the merger agreement.
- In Cigna v. Audax, the Delaware Chancery Court invalidated two provisions in a merger agreement:
 - Indemnification by the Target stockholders for breaches by the Target of its representations and warranties. The Court invalidated the indemnification obligation because it violated the DGCL 251(b) requirement that the merger consideration be firm and determinable; and
 - Release required to be delivered by Target stockholders in a separate document as a condition to receiving the merger consideration, which the Court voided for lack of consideration.

Ways to address Cigna case

- Structure the deal as a stock purchase agreement rather than a merger so that all stockholders sign the purchase agreement
- Hold a portion of the purchase price in escrow
- Put temporal and monetary limits on the indemnification obligations to increase the likelihood of enforceability
- Condition the closing of the merger on acceptance by key stockholders, often by requiring stockholders to sign a separate support agreement
- If including a condition for payment or obligations in a separate contract or letter, provide for additional consideration for the stockholder's agreement

Select Public Company Issues

Tender Offers v. One-Step Mergers

One-Step Merger Process

- Seller and Buyer sign merger agreement
- Seller prepares proxy statement, which is reviewed by the SEC
- After the proxy statement is cleared, Seller sets date for stockholders meeting
- If stockholders approve the merger, deal typically closes shortly thereafter, subject to regulatory approvals
- Merger is effected and Seller stockholders receive merger consideration in exchange for ownership interest in the Seller

Select Public Company Issues (cont'd)

Tender Offers v. One-Step Mergers

Tender Offer Process

- Seller and Buyer sign merger agreement (typical for “friendly” deal, but not required)
- Pursuant to merger agreement, Buyer launches tender offer directly to stockholders
- After end of tender offer period, if sufficient shares are tendered and other conditions are met, tender offer is closed and Buyer acquires tendered shares
- Buyer may thereafter complete a “back end” merger and squeeze out remaining stockholders, subject to compliance with state merger statute

Select Public Company Issues (cont'd)

Benefits of a Tender Offer vs. a One-Step Merger

- **No SEC Pre-Clearance.** SEC pre-clearance of cash tender offer materials is not required before mailing to Seller shareholders. SEC review of cash tender offer materials after distribution is often limited
- **Speed.** A cash tender offer can be completed relatively quickly – 20 business days following commencement in the case of a friendly deal not involving any regulatory or other timing impediments (Delaware Section 251(h) eliminates prior delays in completing back-end merger)
- **Direct.** A tender offer is made directly to shareholders and does not require a shareholder meeting or board approval (could be used for hostile offer, although Section 251(h) may not be used).

Select Public Company Issues (cont'd)

Tender Offers and Section 251(h) of the DGCL

- Tender offers are frequently used as the first step in the acquisition of all of a Seller's common equity and must be followed by a "back-end" merger, where the bidder squeezes out the remaining shareholders for the same consideration offered to shareholders in the tender offer
- Under Delaware law, a back-end merger following a tender offer has long required shareholder approval unless the acquirer owned following the completion of the tender offer at least 90% of each class of target stock otherwise entitled to vote on the merger
- Effective August 1, 2013, Delaware eliminated the possible need for shareholder approval for second-step squeeze-out mergers in qualifying two-step acquisitions
- Under new Section 251(h) of the DGCL (as amended), shareholder approval is not required for the back-end merger if, following the tender offer, the acquirer owns at least the percentage of stock that would otherwise be required for stockholder adoption of the merger agreement (typically >50%) subject to eligibility and other requirements

Considerations in Selecting Form of Acquisition

Generally, the structure of the transaction involves a balancing of competing and sometimes adverse business, tax, corporate law, contract, securities law and accounting considerations.

Basic Questions about Seller

- Public company/private company
- Private company – number and identity of equityholders
- State of incorporation
- What is Buyer buying?
- Is Seller business in a standalone entity or operated as a division of a larger entity?
- Are there assets/businesses the Buyer does not want to acquire?

Tax Treatment

- Tax treatment for Seller
- Tax treatment for Seller stockholders
- Availability and allocation of tax benefits
- Tax treatment for Buyer if later sells all or part of the business
- Compliance with specific tax requirements (for example, REIT rules)

Corporate Law

- Seller shareholder approval
- Buyer shareholder approval
- Appraisal rights

Considerations in Selecting Form of Acquisition (cont'd)

Timing/Other

- Relative leverage of the parties
- Liability profile of the target business
- Ability to obtain indemnity from credit-worthy party
- Financing structures
- Buyout fund structures
- Third party/other consents, regulatory requirements
(including Hart-Scott-Rodino antitrust filing)
- State statutes
- Availability of adequate indemnity from seller to cover liability issues that can't be addressed with chosen structure for deal

Considerations in Selecting Form of Acquisition (cont'd)

- Tax Considerations
 - Taxable or “Tax Free” Transaction - The tax impact on Seller or its stockholders resulting from an acquisition - whether the transaction is taxable or “tax free” (really tax deferred) to Seller - will generally be determined by:
 - the structure of the transaction;
 - the nature and amount of the consideration to be received in the transaction, and
 - the nature of the entity that is the Seller (*i.e.* whether the entity is itself a tax payer or a pass-through entity for tax purposes)
 - General Rule in Taxable Transaction - Seller is taxed on the gain recognized on the sale of the assets sold. Generally, the gain recognized equals:
 - Cash plus
 - Fair market value of property received plus
 - Liabilities assumed (in an asset sale) less
 - Tax basis in assets sold

Considerations in Selecting Form of Acquisition (cont'd)

Tax Considerations (continued)

- Try to Avoid “Double Taxation” in Taxable Asset Sale – taxes paid by the entity selling the assets, and then stockholders pay taxes on the net proceeds distributed from sale.
- “Tax-Free” Transactions - Seller may seek to structure a transaction so that it is, in whole or in part, “tax free” to its stockholders.
- Buyer Tax Preference - A Buyer will generally prefer to acquire assets to maximize its tax benefits but generally must be cognizant of Seller’s tax position in structuring a deal and must also be aware of the disadvantages of an asset acquisition (complexity, consents, expense, etc.)
- **Practice Tip** – Because the tax treatment for a transaction can be one of the biggest drivers of economics based on different transaction structures, deal teams should involve tax counsel early in the process.

Considerations in Selecting Form of Acquisition (cont'd)

- Corporate Law Considerations
 - Mergers - statutory; driven by state law; statutes will dictate approvals, filings, effectiveness of merger and appraisal rights
 - Corporate Approval Matters - (Affects Timing)
 - Board of Directors Approvals
 - Stockholder Approvals
 - Third Party Approvals
- Third Party Consents
 - Sometimes deal structure will dictate whether or not third party consents are required for the deal. An example would be a key lease or IP license that prohibits assignment but has no restrictions on a change of ownership.

Considerations in Selecting Form of Acquisition (cont'd)

- Securities Law Considerations

Whenever stock is being transferred in a transaction, securities law issues need to be considered.

- Acquisitions of private companies - Buyer must find exemption from federal securities law requirements to register its stock in an acquisition
- State securities laws - Consider state securities law matters; may have filings or approvals at the state level depending on structure and the nature of the parties receiving stock in the acquisition; may have pre- or post-transaction filings; consult local counsel if Seller or Seller's stockholders reside in different states

Hypothetical Facts

<u>Scenario One</u>	<u>Possible Outcome</u>
<ul style="list-style-type: none">• Private company with 100+ stockholders	<ul style="list-style-type: none">• Too many stockholders to pursue negotiated stock acquisition. Asset acquisition or merger may be preferable.
<ul style="list-style-type: none">• Same as above, but also has key IP licenses that require consent to assign	<ul style="list-style-type: none">• May not be able to do asset sale; as a result may have to structure as a merger
<u>Scenario Two</u>	
<ul style="list-style-type: none">• Business operated in a subsidiary of a larger corporate group	<ul style="list-style-type: none">• Could buy as stock sale, asset sale or merger
<ul style="list-style-type: none">• Same as above, but other businesses not desired by the Buyer are also in the same subsidiary	<ul style="list-style-type: none">• This rules out stock sale or merger, unless unwanted businesses are transferred out prior to closing and Seller provides adequate indemnity with respect to retained businesses
<ul style="list-style-type: none">• Same as above, but subsidiary also has significant contingent liabilities	<ul style="list-style-type: none">• This may drive to an asset acquisition unless Seller can provide creditworthy indemnity on acceptable terms to cover the contingent liability

Questions

ASIA

Almaty
Astana
Beijing
Singapore
Tokyo

EUROPE

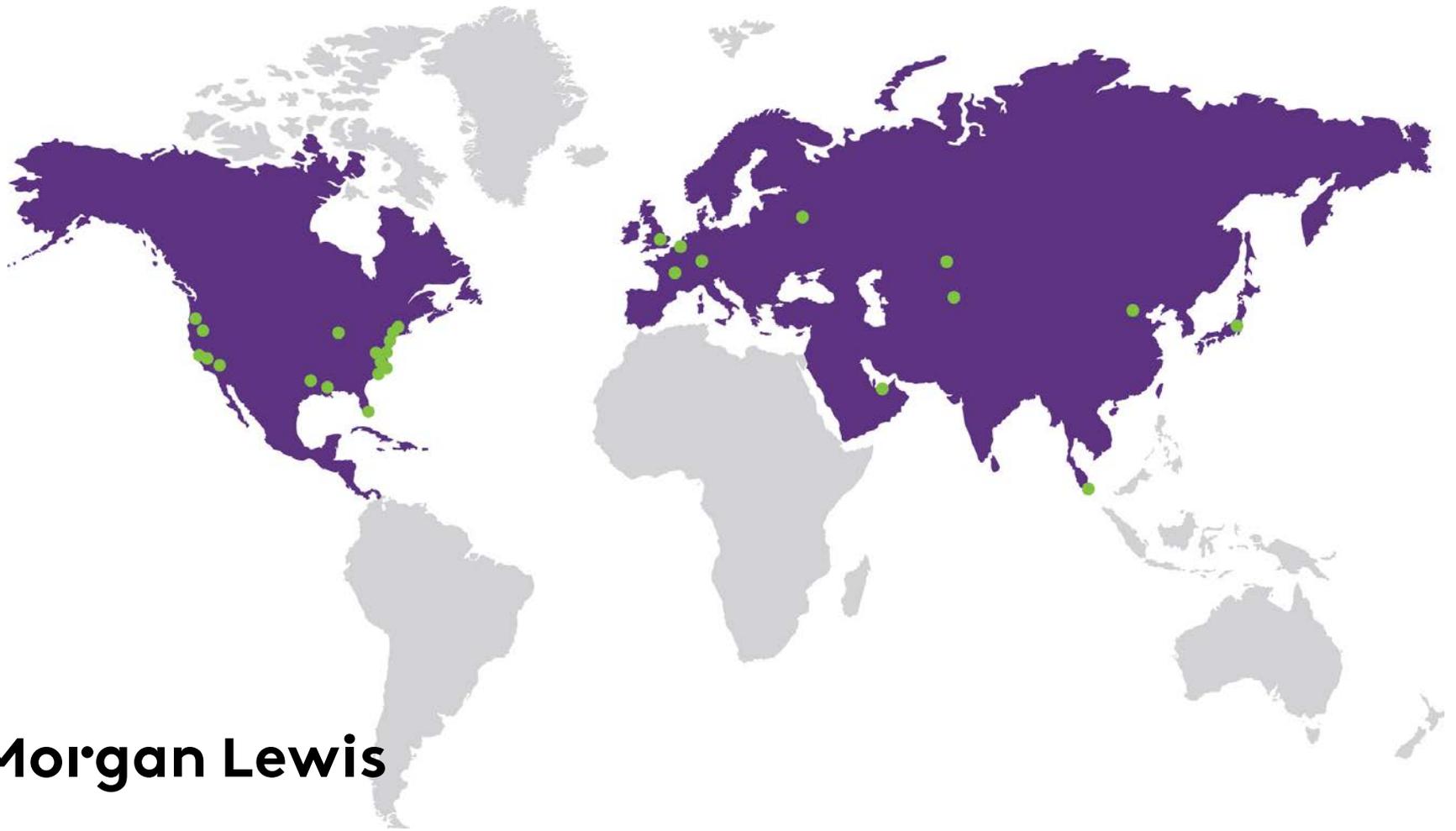
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