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For further information about this Guide or our U.S. M&A capabilities, please contact any of the following partners:

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This Guide to Takeovers in the United States provides a summary overview of the principal legal considerations with respect to takeovers of U.S. public companies. It considers, from both a legal and regulatory perspective, the various stages of a takeover from the initial approach to, through to obtaining control of, the target company. It addresses several key areas—the applicable regulatory framework (Chapter One), preliminary takeover activity, including stakebuilding, preliminary agreements and seeking support from the target’s shareholders (Chapter Two), primary acquisition structures (Chapter Three), deal protection, including “no-shop,” “no-talk” and “go-shop” provisions as well as “fiduciary outs” and break fees (Chapter Four), fiduciary duties applicable to a target company’s board of directors in the M&A context (Chapter Five), takeover defenses (Chapter Six), antitrust/merger clearance (Chapter Seven) and U.S. regulation of non-U.S. investment in the United States (CFIUS) (Chapter Eight). This Guide does not, however, address any financial, tax or accounting matters or the application to takeovers of securities and other laws of jurisdictions outside the United States.

Many of the legal issues discussed in this Guide are potentially applicable to takeovers of non-U.S. companies that have shares traded or held in the United States. While the Guide touches briefly on some of the issues that arise in that context, its principal focus is on takeovers of U.S. public companies. Other issues that are not covered in this Guide must also be addressed when the target company is a non-U.S. company.

The Guide does not purport to be comprehensive, but rather provides a summary overview of a series of complex topics. It is not intended to, and does not, constitute legal advice.

The information contained in this Guide is accurate as of October 2010.
1. Regulatory Framework

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In this chapter, we provide a brief overview of the more significant regulatory requirements likely to be relevant to an acquisition of a U.S. public company.

**State Corporate Laws**

Most domestic U.S. publicly traded businesses are organized as corporations. With very limited exceptions, the laws under which U.S. corporations are organized are state (not federal) laws. State corporate laws dictate what shareholder approvals are required for a particular form of transaction.\(^1\) State corporate laws also establish the duties of a target company’s board of directors during the takeover process. Accordingly, state corporate laws govern the ability of a target company’s board of directors to reject or resist unsolicited takeover proposals, as well as the board’s responsibilities when negotiating the terms of a takeover or choosing from among competing proposals.

When we discuss corporate laws in this Guide, unless otherwise indicated, we are referring to Delaware law. According to recent studies, more than 50% of the corporations in the Fortune 500 are incorporated in Delaware.

**Federal Securities Laws**

The primary U.S. federal securities laws that are potentially applicable to takeover transactions are:

- the **registration requirements of the Securities Act of 1933** (the “Securities Act”), which potentially apply to M&A transactions when the consideration to be received by the target’s shareholders includes securities;

\(^1\) In one situation, stock exchange rules also are relevant to shareholder approval requirements: if the acquirer in a share-for-share transaction is listed on a U.S. exchange and as a result of the transaction will increase the number of its outstanding shares by 20% or more, the acquirer will be required under stock exchange rules to obtain the approval of its own shareholders.

- the provisions of the Securities Exchange act of 1934 (the “Exchange Act”) and related rules governing proxy solicitations in respect of shares registered under the Exchange Act (generally referred to as the **proxy rules**); and

- the portions of the Exchange Act and related rules governing the conduct of tender offers (generally referred to as the **tender offer rules**).

**Securities Act**

The registration requirements of the Securities Act potentially apply to share-for-share acquisitions and other transactions in which the target’s shareholders are offered securities. **The registration requirements of the Securities Act do not apply to all-cash M&A transactions.**

For purposes of the Securities Act, an M&A transaction in which the consideration to be received by the target company’s shareholders consists in whole or in part of securities is deemed to involve an offer and sale of securities, regardless of whether the transaction is effected pursuant to a tender offer or a shareholder vote. Under the Securities Act, unless an exemption is available, (i) an offer to sell securities cannot be made until a registration statement covering the proposed offering has been filed with the SEC, and (ii) a sale (defined to include a binding contract of sale) cannot be effected until the registration
For most share-for-share acquisitions of U.S. public companies, no exemption from registration will be available and, as a result, a share-for-share acquisition of a U.S. public company almost certainly will have to be registered under the Securities Act. If the target company in a share-for-share transaction qualifies as a foreign private issuer under the SEC’s rules or is closely held, exemptions from registration under the Securities Act may be available.

The SEC’s rules prescribe various forms of registration statements for use in registering different kinds of transactions under the Securities Act. For a share-for-share transaction, the required form of registration statement is Form S-4 or, if the acquirer qualifies as a foreign private issuer, Form F-4. For any share-for-share acquisition of a U.S. public company, in addition to the registration requirements of the Securities Act, the transaction also will be subject to either the proxy rules or the tender offer rules because the transaction will be effected either pursuant to a “single-step” merger that requires a vote of the target’s shareholders, or pursuant to an exchange offer. Accordingly, the disclosure document required to be included in the registration statement must satisfy both of the applicable sets of rules (the Securities Act rules and either the proxy rules or the tender offer rules). The disclosure document to be sent to the target company’s shareholders must contain detailed disclosure regarding, among other things, the terms of the transaction, the negotiations between the parties, the target board of directors’ deliberations, fairness opinions of financial advisors, historical financial information with respect to the target and acquirer and, depending on the size of the target relative to the acquirer, pro forma financial information giving effect to the transaction. The SEC’s legal and accounting staff normally will review and comment on a registration statement prior to the SEC declaring the registration statement effective under the Securities Act.

The process of preparing the registration statement and dealing with the SEC staff’s comments typically would be expected to take not less than six weeks, and sometimes much longer, especially for a first-time registrant (a company that has never filed a registration statement with the SEC). Particularly for a non-U.S. acquirer whose shares are not already listed on a U.S. exchange, complying with these Securities Act registration requirements can be time-consuming and expensive.

For an acquirer that is not already subject to the ongoing reporting requirements of the Exchange Act, the use of a Securities Act registration statement to effect an M&A transaction will trigger a requirement to comply with those ongoing reporting requirements from the time the registration statement is declared effective.

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2 The SEC’s definition of a foreign private issuer is set out on page 21.
3 Some states expressly permit compulsory share exchanges that eliminate the need for a merger. See footnote 8 on page 19 for a more detailed explanation of this structuring alternative.
4 In U.S. practice the disclosure document used in a transaction subject to registration under the Securities Act is called a prospectus; the disclosure document used to solicit proxies is called a proxy statement; and the disclosure document used in a tender offer is called an offer to purchase. Hybrid disclosure documents have hybrid names—for example, a disclosure document used in a share-for-share transaction to be voted on by the target company’s shareholders is called a proxy statement/prospectus.
effective by the SEC. The ongoing reporting requirements include, in the case of a U.S. domestic issuer, the requirement to file annual reports on Form 10-K, quarterly reports on Form 10-Q and interim reports on Form 8-K, and in the case of a foreign private issuer, the requirement to file annual reports on Form 20-F and interim reports on Form 6-K. If the acquirer’s shares are not subsequently listed on a U.S. exchange, it may be possible at a later date to deregister the shares and thereby end the obligation to comply with the SEC’s periodic reporting requirements.\(^5\)

**Proxy Rules**

Some public company acquisition structures require a vote by either or both of the target’s or the acquirer’s shareholders. If the class of shares to be voted is registered under Section 12 of the Exchange Act (which will always be the case if the shares to be voted are listed on a U.S. exchange), the process of soliciting those votes will be subject to the SEC’s proxy rules unless the issuer of the shares qualifies as a foreign private issuer under the SEC’s rules.\(^6\) The proxy rules set forth detailed disclosure requirements that are similar in many respects to the Securities Act disclosure requirements described above. A proxy statement cannot be sent to shareholders in definitive form until it has been on file with the SEC for at least 10 days. If the SEC staff provides comments on the proxy statement, there may be a longer delay before it can be sent to shareholders in definitive form.

**Tender Offer Rules**

If the proposed takeover is structured to involve an offer to purchase shares directly from the shareholders of the target, the tender offer rules will be applicable. An offer for shares that are not registered under Section 12 of the Exchange Act is subject only to the (relatively limited) requirements imposed by Section 14(e) of, and Regulation 14E under, the Exchange Act. By contrast, an offer for shares that are registered under Section 12 of the Exchange Act also is subject to the more extensive requirements imposed by Section 14(d) of, and Regulation 14D under, the Exchange Act. Shares that are listed on the NYSE, Nasdaq or another U.S. exchange must be registered under Section 12 of the Exchange Act. For tender offers subject to Regulation 14D, detailed disclosure requirements apply.

An offer for shares of a foreign private issuer will be exempt from most of the requirements imposed by Regulations 14D and 14E if the percentage of the class of the target’s shares being sought in the offer that is held by U.S. holders is not more than 10%, pursuant to the “Tier I” exemption. If the U.S. ownership level is over 10% but is not more than 40%, a more limited set of exemptions, the “Tier II” exemptions, may be available. The calculation of the 10% and 40% thresholds are not straightforward exercises and must be done in accordance with SEC-prescribed rules.

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\(^5\) This can present a difficult choice. A decision by an acquirer not to list its shares on a U.S. exchange in order to facilitate subsequent deregistration may make its acquisition proposal less attractive to the target company and its shareholders, or could lead to flowback that puts pressure on the acquirer’s share price.

\(^6\) Solicitations in respect of shares of foreign private issuers are exempt from the proxy rules under Exchange Act Rule 3a12-3(b).

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followed by a merger that “squeezes out” any untendered shares, typically by converting them into the right to receive the same cash price per share offered in the tender offer. The two-step approach usually has timing advantages over the alternative single-step transaction structure. These alternative acquisition structures are discussed in more detail in Chapter 3 of this Guide.

Other Primary Regulations

Federal Securities Laws Applicable to Stakebuilding

Would-be acquirers seeking to acquire stakes in target companies must take into account the restrictions on insider trading imposed pursuant to Rule 10b-5 under the Exchange Act; the potential requirement to report beneficial ownership of shares in excess of 5% on Schedule 13D; and the “short-swing profits” rules imposed under Section 16(b) of the Exchange Act (which potentially can require disgorgement of profits from trading after the acquirer’s position in the target’s shares exceeds 10%).\(^7\) Stakebuilding and related matters are discussed in Chapter 2 of this Guide.

Antitrust/Merger Clearance

Many U.S. M&A transactions are subject to the clearance process imposed under the U.S. Hart-Scott-Rodino Antitrust Improvements Act (commonly referred to as the “HSR Act”). The HSR clearance process and other antitrust matters are discussed in Chapter 7 of this Guide.

Exon-Florio/CFIUS

The Exon-Florio provision of the Defense Production Act grants the President of the United States the authority to suspend or prohibit acquisitions of U.S. businesses by non-U.S. investors that threaten to impair the national security. The authority to administer the Exon-Florio provision has been delegated to the Committee on Foreign Investment in the United States (“CFUIS”). The Exon-Florio provision contemplates that parties to a transaction can voluntarily submit to a review of their proposed transaction by CFIUS. Despite the voluntary nature of the notification, acquirers that believe their transaction could possibly give rise to national security concerns typically choose to follow the notification process because acquisitions by non-U.S. investors that fall within the Exon-Florio provision but are not cleared by CFIUS remain indefinitely subject to the imposition of divestment or other requirements by the President. The Exon-Florio provision and CFIUS are discussed in Chapter 8 of this Guide.

Regulated Industries

Various federal and state regulatory requirements may apply to transactions of targets operating in particular industries, including:

- Registered Investment Funds/Advisers
- Banking/Financial Institutions
- Energy
- Natural Resources
- Public Utilities
- Telecommunications
- Gaming
- Defense
- Insurance

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\(^7\) Under Exchange Rule 3a12-3(b), Section 16 does not apply to acquisitions of shares of foreign private issuers.