Merging Faster: A New Structure for Merger of Equals or Other Large Stock-for-Stock Public Mergers

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Mergers of equals and other large stock-for-stock public mergers can take a significant amount of time to complete, exposing the merger parties to potential risks. However, by combining a two-step double dummy merger with dual exchange offers, the transaction timeline can be substantially reduced. This article provides step-by-step guidance on conducting a double dummy dual exchange offer two-step merger and highlights the primary advantages and disadvantages of this innovative transaction structure.

Mergers of equals and other stock-for-stock public mergers that require a stockholder vote of both merger parties are usually structured as one-step mergers.

Although target stockholder approval is almost always required by state corporate law to complete a public merger (for example, see Del. Code Ann. tit. 8, § 251(c)), state corporate law is much less likely to require the acquirer's stockholders' approval. In a merger of equals or a stock-for-stock public merger, however, an acquirer may need to obtain its stockholders' approval due to stock exchange listing requirements or other transaction related considerations. For example, an acquirer may need to obtain its stockholders' approval in a one-step merger if:

- **The acquirer is issuing shares that represent more than 20% of its outstanding stock or voting power.** In this case, the rules of the stock exchange on which the acquirer's stock is listed (for example, the New York Stock Exchange (NYSE) or NASDAQ Stock Market (NASDAQ)) may require that the issuance be approved by its stockholders (see Practice Notes, NASDAQ 20% Rule: Stockholder Approval Requirements for Securities Offerings (9-506-3766) and NYSE 20% Rule: Stockholder Approval Requirements for Securities Offerings (8-508-2261)).
- **The acquirer does not have sufficient authorized but unissued stock to pay the merger consideration.** State corporate law typically requires that a corporation's certificate of incorporation contain the corporation's number of authorized shares (for example, see Del. Code Ann. tit. 8, § 102(a)(4)). If the number of authorized shares needs to be increased to permit the acquirer to pay the merger consideration, the acquirer's stockholders will need to approve an amendment to the acquirer's certificate of incorporation to increase the number of authorized shares.
- **The acquirer agrees to a governance change that requires any other amendment to its** organizational documents**.** The merger parties frequently agree to governance changes in mergers of equals (for example, an increase in board size to allow for members of the other merger party to join the board or a change in the corporation's name or business purpose). Although some governance changes can be implemented with only board approval, other changes (depending on applicable state corporate law and the acquirer's governing documents), may require the acquirer's stockholders to approve the amendment.

The process for completing a one-step merger involving stock consideration if both merger parties' stockholders must approve the transaction takes four to six months (see Public Merger Timeline (Stock Consideration) (W-005-2502), and often much longer (for example, if antitrust or other industry-specific regulatory review is required). Not only must the acquirer file a registration statement on Form S-4 with the Securities and Exchange Commission (SEC), but the merger parties must prepare a "joint proxy statement/prospectus" to send to each of their voting stockholders to approve the merger and other proposals. The SEC frequently reviews and comments on the joint proxy statement/prospectus, adding to the time it takes to complete a one-step merger. For additional information on the disclosure requirements applicable to one-step mergers, see Practice Note, Public Mergers Disclosure: Overview (0-382-1406).

However, by structuring the transaction as a two-step merger using a double dummy merger and dual exchange offers, the length of time to complete a merger of equals or other large stock-for-stock public

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merger can be substantially decreased, as well as provide the merger parties with additional benefits. This article provides detailed step-by-step guidance on completing a double dummy dual exchange offer two-step merger and examines the potential advantages and disadvantages of adopting this innovative transaction structure.

DOUBLE DUMMY DUAL EXCHANGE OFFER TWO-STEP MERGERS: KEY STEPS

The key steps of a double dummy dual exchange offer two-step merger are:

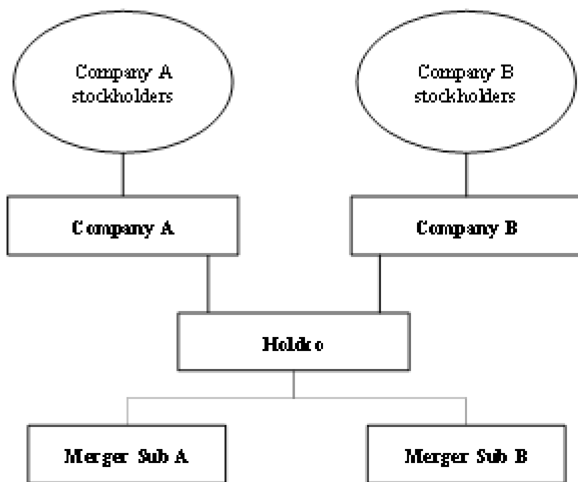
- **The formation of a holding company and the merger subsidiaries.** The merger parties first form a holding company. The holding company then forms two merger subsidiaries.
- **The consummation of dual exchange offers.** The two merger subsidiaries complete exchange offers to exchange the holding company's stock for the stock of the merger parties. Following the consummation of the exchange offers, the merger parties' former stockholders that accepted the exchange offer solely own shares of the newly formed public holding company.
- **The completion of double reverse subsidiary mergers.** The merger subsidiaries merge with and into the merger parties, squeezing out any of the merger parties' stockholders who did not accept the exchange offers. The merger parties become wholly owned subsidiaries of the newly formed public holding company.

The merger parties must agree to this transaction structure in the negotiation phase of the transaction and reflect these steps in the merger agreement.

STEP ONE: FORM THE HOLDING COMPANY AND THE MERGER SUBSIDIARIES

The merger parties (Company A and Company B) form a new holding company (Holdco). Holdco is a successor issuer under Rule 12g-3 of the Securities Exchange Act of 1934 (Exchange Act) (17 C.F.R. § 240.12g-3), and therefore eligible to use short-form disclosure in the Form S-4 registration statements that will register the Holdco common stock to be issued in each exchange offer (see Successor Issuer Form S-3 and Form S-4 Eligibility).

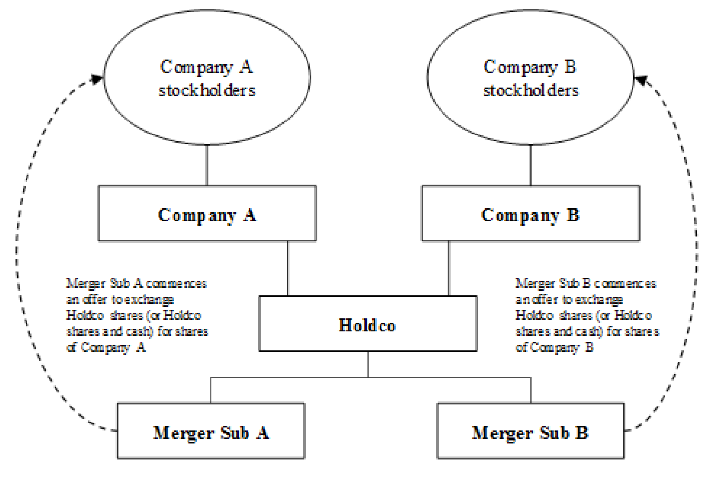
Holdco then forms two merger subsidiaries (Merger Sub A and Merger Sub B).



STEP TWO: CONSUMMATE THE DUAL EXCHANGE OFFERS

In step two of the transaction:

- Merger Sub A commences an exchange offer with Company A stockholders, offering Holdco stock (or Holdco stock and cash) in exchange for the Company A common stock.
- Merger Sub B commences an exchange offer with Company B stockholders, offering Holdco stock (or Holdco stock and cash) in exchange for the Company B common stock.



Key considerations for the merger parties in step two include:

- The preparation and filing of disclosure documents with the SEC.
- The conditions of the exchange offers.
- Whether the merger parties can conduct a medium-form merger to squeeze-out non-tendering stockholders.
- Whether the use of a top-up option is necessary.
- The benefits to the merger parties, even if required to conduct a long-form merger.

Disclosures

The exchange offers require the merger parties to prepare and file several disclosure documents with the SEC. These disclosure documents include:

- **Form S-4.** Because the offering of Holdco stock to the merger parties' stockholders constitutes a public offering of securities, Holdco must file a Form S-4 registration statement for each exchange offer (or one combined Form S-4 for both exchange offers).
- **Schedule TO.** Holdco and both Merger Sub A and Merger Sub B must file a Schedule TO (tender offer statement) with the SEC for each exchange offer. The primary disclosure document in an exchange offer is the offer to exchange. The disclosure required for the Form S-4 registration statement and the offer to exchange is typically combined in one disclosure document, called an "offer to exchange/prospectus," which is an exhibit and typically incorporated by reference into the Schedule TO from the Form S-4.
- **Schedule 14D-9.** Company A and Company B are required to respond to the exchange offers by filing a Schedule 14D-9 with the SEC that, among other things, discloses their respective board's position on the applicable exchange offer.

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For additional information on the disclosure requirements triggered by an exchange offer, see Practice Note, Tender Offers: Overview: Disclosure and Documentation (1-382-7403).

Conditions

Each exchange offer commences at the same time, with substantially the same offer conditions. To align timing, each exchange offer is conditioned on the substantially simultaneous closing of the other exchange offer. For an example of typical tender offer closing conditions in two-step mergers, see Standard Document, Tender Offer Closing Conditions in Public Mergers (W-010-0586).

Medium-Form Merger

If both Company A and Company B are organized in states that permit medium-form mergers (see, for example, Del. Code Ann. tit. 8, § 251(h); Md. Code, Corps. & Ass'ns § 3-106.1; Tex. Bus. Orgs. Code Ann. § 21.459(c); Va. Code Ann. § 13.1-718), the minimum tender condition for each exchange offer is typically a majority of the outstanding shares (unless the target company's organizational documents require a supermajority vote). Once the minimum tender condition and other conditions for a medium-form merger are satisfied, Holdco can complete the second-step merger and acquire all of the common stock of Company A and Company B without a stockholder vote the business day after the exchange offers close.

For additional information on medium-form mergers, see Standard Document, Merger Agreement (Tender Offer, Pro-Buyer): Drafting Note, Merger Governed by DGCL § 251(h); No Stockholder Approval Required (3-500-5939). For an example of a timeline of a two-step medium-form merger, see Tender Offer Timeline (With Section 251(h) Merger) (1-548-3827).

Top-Up Option

If either Company A or Company B is organized in a state that does not permit medium-form mergers, Holdco can set the minimum tender condition at the percentage required to approve the merger (usually a majority of the outstanding shares, unless the target company's organizational documents require a supermajority vote) and use a top-up option to reach the percentage necessary for a short-form merger under applicable state corporate law, typically 90% of the target's outstanding shares (see, for example, Del. Code Ann. tit. 8 § 253(a)).

A top-up option allows the acquirer (Merger Sub A or Merger Sub B) to purchase an amount of new target company shares directly from the target company (either Company A or Company B) that, when combined with the stock acquired in the tender offer, constitutes enough shares to meet the threshold required to complete a short-form merger. A top-up option is only effective in avoiding a stockholder vote, however, if:

- The target company has a sufficient amount of authorized but unissued shares available to fulfill the top-up option.
- The amount of stock necessary to reach the short-form merger threshold is less than 20% of the target company's outstanding stock or voting power; otherwise the rules of the stock exchange on which the target company's stock is listed, for example the NYSE or NASDAQ, may require that a larger issuance be approved by the target company's stockholders (see Practice Notes, NASDAQ 20% Rule: Stockholder Approval Requirements for Securities Offerings (9-506-3766) and NYSE 20% Rule: Stockholder Approval Requirements for Securities Offerings (8-508-2261)).

For additional information on top-up options, see Practice Note, Tender Offers: Overview: Using the Top-Up Option to Achieve a Short-Form Merger (1-382-7403).

Long-Form Merger

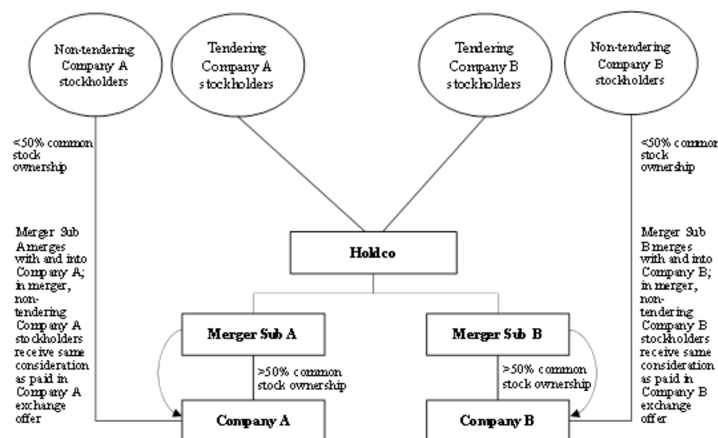
If a medium-form merger is unavailable and a top-up option requires the target company's stockholders' approval, there are still benefits to closing the exchange offers and completing the transaction using a long-form merger.

In a long-form merger, the merger parties still need to prepare proxy materials and obtain the target company's stockholders' approval prior to completing the applicable back-end merger. However, even in a long-form merger, Holdco retains the advantage of owning the requisite votes to control the approval of the back-end merger as soon as the applicable exchange offer is completed. The additional step of procedurally obtaining stockholder approval (even though the outcome is controlled by Holdco) generally takes an additional one to two months after the closing of the exchange offers to complete. Although completing the back-end merger as a long-form merger reduces the time benefits of the double dummy dual exchange offer two-step merger, the acquirer still retains the benefit of having certainty over the closing (in the form of extinguishing the target's fiduciary out to withdraw its recommendation to its stockholders or to terminate to accept a third-party superior proposal) as soon as the exchange offers close. In a one-step merger the acquirer does not have certainty over the closing until the stockholders' approve the transaction, which generally takes more time to achieve than the completion of the exchange offers (see Speed of Completion).

For an example of a timeline of a two-step long-form merger, see Tender Offer Timeline (2-383-1032).

STEP THREE: DOUBLE REVERSE SUBSIDIARY MERGER

Following the acceptance of the minimum amount necessary to approve the mergers in both exchange offers, and any other necessary steps (see Step Two: Consummate the Dual Exchange Offers), Merger Sub A and Merger Sub B merge with and into Company A and Company B, respectively, to squeeze out non-tendering stockholders.



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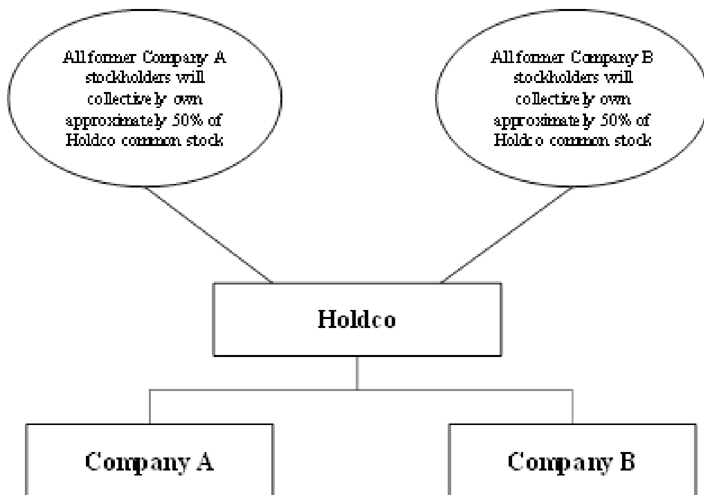
POST-CLOSING STRUCTURE

The post-closing structure is the same as in a typical double dummy merger. In particular, a newly formed public holding company holds 100% of the stock of each of Company A and Company B.

The diagram below assumes that the transaction is a merger of equals. In a stock-for-stock merger that is not a merger of equals, the relative percentages of Holdco stock owned by the former Company A and Company B stockholders may be different.



ADVANTAGES

There are several advantages to using the double dummy dual exchange offer two-step merger structure, including:

- Increased speed of completion.
- The ability to add takeover defenses to the surviving company's certificate of incorporation without additional unbundled stockholder approvals.
- Improved chances of stockholder approval of the transaction.
- Tax benefits.
- Retention of Form S-3 and Form S-4 short-form disclosure eligibility.

SPEED OF COMPLETION

One of the primary advantages of the double dummy dual exchange offer two-step merger is that it decreases the amount of time necessary to complete a transaction. As a general matter, the merger parties prefer to close the transaction quickly.

Acquirers prefer to close and control the target company as soon as possible to:

- Minimize the business risks associated with the uncertainty of a merger.
- Benefit from the merger synergies sooner.
- Decrease the risk of a competing bid.

Target companies prefer to reduce the time between signing and closing to:

- Mitigate the risk of events occurring that may allow the acquirer to terminate the transaction, including:
  - the target breaching one of the merger agreement's representations or covenants; and
  - the occurrence of a material adverse change.
- Provide their stockholders with the merger consideration sooner.
- Potentially benefit from a higher price premium (the acquirer may pay more if a quicker closing is possible).

Additionally, both merger parties want to avoid risks that may jeopardize the closing, but that were unforeseeable at the time of signing the merger agreement.

A two-step merger can be completed more quickly than a one-step merger. A one-step stock-for-stock merger typically takes four to six months to close. An exchange offer, however, can be commenced at the same time the merger parties file the disclosure documents with the SEC, and can therefore be completed in as few as 20 business days. Although a two-step merger also requires the preparation of a substantial disclosures (see Disclosures), assuming the prompt filing of the Schedule TO and Form S-4 after signing, and no extended regulatory review period, a two-step merger can close in as little as two months.

One of the reasons why two step-mergers can be completed quicker than one-step mergers is that the SEC tends to review and comment on exchange offer disclosures faster than it reviews and comments on disclosures for mergers involving stock consideration. For example, when the SEC reviews a merger involving stock consideration, the median delay is 51 days compared to no review. When the SEC reviews an exchange offer, there is no delay compared to no review. (See American Bar Association, Mergers and Acquisitions: Market Trends Subcommittee, *2017 Strategic Buyer/Public Target M&A Deal Points Study*, available at the *americanbar.com* (subscription required).)

For additional information about the SEC review process and related timing considerations in two-step mergers as compared to one-step mergers, see Practice Note, Tender Offers: Overview: SEC Review and Timing Considerations (1-382-7403).

If the merger parties are unsure whether an extended regulatory, antitrust, or other review is required, or whether other circumstances exist that may make a two-step merger disadvantageous, the merger parties could also provide in the merger agreement for a dual-track structure. The dual-track approach has been used in traditional two-step mergers in the past (for summaries of merger agreements in which the dual-track structure has been used, see What's Market, 3G Capital/Burger King Holdings, Inc. Merger Agreement Summary and Bain Capital/The Gymboree Corporation Merger Agreement Summary). Pursuing a two-step merger and one-step merger on a dual track allows the merger parties to abandon the exchange offer(s), if necessary, and continue the transaction as a one-step merger (or two one-step mergers if a double dummy structure is used).

Similarly, if the acquirer requires financing to pay any cash merger consideration or the merger parties were otherwise not assured of closing the second-step mergers on the business day following the closing of the exchange offers (for example, if Company A or Company B was not incorporated in a state permitting medium-form mergers, or the use of a higher minimum tender condition and a top-up option was not available), the merger parties may decide to implement a dual-track structure.

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For additional information on this dual-track option, see Practice Note, What's Market: Tender Offers: Dual-Track Structure (2-500-8392).

ADDING NEW TAKEOVER DEFENSES WITHOUT AN UNBUNDLED STOCKHOLDER VOTE

The double dummy dual exchange offer two-step merger structure permits the merger parties to add more and stronger takeover defenses to the surviving company's (Holdco's) organizational documents without having to comply with the anti-bundling rule set out in Rule 14a-4(a)(3) of the Exchange Act (17 C.F.R. § 240.14a-4(a)(3)).

Examples of takeover defenses that the merger parties might add to Holdco's certificate of incorporation, include:

- A staggered board.
- The elimination of the stockholders' ability to call special meetings.
- A prohibition on stockholder action by written consent.
- A limitation on the stockholders' right to remove directors to allow removal only for cause.

For additional information on the takeover defenses available to public companies, see Practice Note, Defending Against Hostile Takeovers (9-386-7206).

The anti-bundling rule requires that the proxy materials break out for a separate vote each matter considered by the stockholders, even if a separate vote is not required by state law. For example, in a one-step merger of equals, if the merger parties want to add a staggered board and neither merger parties' certificate of incorporation provides for a staggered board, the stockholders must separately vote for the merger and the staggered board certificate of incorporation amendment.

Unbundled proposals can be cross-conditioned so that all proposals must be approved for a transaction to close. However, cross-conditioning a merger proposal with a takeover defense proposal introduces the risk that stockholders (particularly activist stockholders) may approve the merger proposal, but not the takeover defense proposal.

Most target companies prefer not to delay the closing of the transaction for non-essential stockholder proposals if the approval needed to close the merger is obtained. The anti-bundling rule has caused merger parties to avoid adding new takeover defenses to the surviving company's organizational documents and, in the case of some double dummy mergers, even removing existing takeover defenses if they would result in additional required unbundled stockholder approvals (regardless of whether they could be cross-conditioned). For more information on the anti-bundling rule, see Legal Update, SEC Issues C&DIs to Unbundle Shareholder Votes on Proposed Corporate Governance Changes in Mergers (W-000-7410).

However, the anti-bundling rule applies to proxy solicitations, not to tender offers. Therefore, if the merger parties use the double dummy dual exchange offer two-step merger structure, the merger parties can add new takeover defenses to Holdco's certificate of incorporation without stockholder approval. Although this difference in the certificate of incorporation of the merger party as compared to Holdco would need to be explained in the offer to purchase, the only decision for Company A and Company B stockholders is whether to tender into the exchange offers. It is unlikely that stockholders would refuse to tender due to new takeover defenses included in Holdco's organizational documents.

For companies incorporated in states without medium-form merger statutes and where a top-up option without stockholder approval is unavailable, even if the second-step merger must be approved by a stockholder vote at a stockholders' meeting, Holdco would hold sufficient votes of Company A and/or Company B after the closing of the exchange offers to approve both the merger proposal and any takeover defense proposals.

Additionally, the double dummy dual exchange offer two-step merger structure gives the merger parties the flexibility to consider incorporating Holdco in a jurisdiction with more stringent anti-takeover laws (for example, Pennsylvania or Indiana), and without the need to include separate proposals to be voted on for these matters. The rise in stockholder activism puts a premium on finding creative ways to include additional takeover defenses in the organizational documents of public companies, and this new transaction structure facilitates that outcome.

IMPROVED CHANCES OF STOCKHOLDER APPROVAL

Many common transaction risks are not applicable to, or are significantly reduced because of, the double dummy dual exchange offer two-step merger structure. These risks include:

- **A negative review by a proxy advisory firm.** Although mergers are typically reviewed by proxy advisory firms (for example, Institutional Shareholder Services Inc., Glass, Lewis & Co., and Egan-Jones Ratings Company) that provide recommendations on how stockholders should vote, proxy advisory firms do not typically review tender offers and exchange offers. Using the double dummy dual exchange offer two-step merger structure therefore greatly reduces the risk of a negative review.
- **Empty voting.** Tender offers and exchange offers avoid the issue of empty voting where stockholders sell their shares after the record date but before the stockholders' meeting date. This can be a significant issue in mergers that are opposed by activist stockholders.
- **Deal activism.** Tender offers and exchange offers reduce the leverage that activist stockholders have to attempt to negotiate concessions in a transaction. For example, activist stockholders may seek to persuade the acquirer or target stockholders to vote against a merger unless, for the acquirer stockholders, the acquirer cuts the price or, for target stockholders, the target company gets a higher price. In an exchange offer, the offeror (Holdco) does not need to be concerned about record dates and meeting dates, and can easily extend the exchange offer by a public press release if the minimum tender condition has not been met during the tender period. By contrast, in a one-step merger, if the stockholders' meeting is commenced without having sufficient votes to approve the merger, the meeting cannot be adjourned unless there are sufficient stockholder votes in favor of approving the adjournment proposal (which may not be possible if activist stockholders are agitating to vote against the merger).

TAX-FREE TREATMENT

The stockholders of Company A and Company B receive their shares of Holdco tax free under Internal Revenue Code Section 351 regardless of the percentage of the total consideration that is paid in

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cash, although the stockholders will have to recognize taxable gain on the transaction up to the amount of the cash that they receive. In a one-step merger, in which a subsidiary of Company A merges into Company B (a reverse subsidiary merger) or where Company B merges into Company A or a subsidiary of Company A (a forward merger or forward subsidiary merger), the stockholders are taxed on both the shares and cash received unless the cash does not exceed 20% of the total consideration in a reverse subsidiary merger and does not exceed 60% in a forward merger or forward subsidiary merger. The double-dummy merger therefore essentially eliminates the cap on how much cash can be paid to either Company A or Company B stockholders in the transaction (and still qualify for tax-free treatment of the stock portion of the transaction consideration).

For additional information on the tax benefits of using the double dummy merger structure, see Practice Note, Tax-Free Reorganizations: Acquisitive Reorganizations: Double Dummy Merger: Tax-Free Transaction but not Tax-Free Reorganization (0-386-4212).

SUCCESSOR ISSUER FORM S-3 AND S-4 ELIGIBILITY

The same successor issuer status applies whether the transaction is a one-step merger or a two-step merger. Holdco would be a successor issuer under Rule 12g-3 of the Exchange Act (17 C.F.R. § 240.12g-3), and would remain eligible to use short-form disclosure on Form S-3 and Form S-4 registration statements. Retaining Form S-3 and Form S-4 short-form disclosure eligibility is valuable because it substantially reduces the amount of the time necessary to prepare registration statements and offering documents and allows the successor issuer to maintain shelf registration statements. A shelf registration statement on Form S-3 allows the company to quickly sell securities whenever the company decides the market conditions are most favorable. A shelf registration on Form S-4, in addition to registering shares for public company acquisitions, can be used to issue shares as consideration for future acquisitions of private companies.

For additional information on short-form eligibility and shelf registration statements, see Practice Notes, Registration Statement: Form S-3 (9-381-2600) and Shelf Registrations: Overview (5-381-0962).

DISADVANTAGES

The double dummy dual exchange offer two-step merger structure is not free of disadvantages. Potential disadvantages include:

- An increase in the level of acquirer stockholder action required to approve the transaction.
- Reduced timing benefits if a long regulatory review period is necessary.
- A potential increase in the number of required third-party consents.
- Constraints imposed by the tender offer rules.

LEVEL OF ACQUIRER STOCKHOLDER ACTION REQUIRED

In mergers of equals and other large stock-for-stock mergers structured as one-step mergers, even if the acquirer's stockholders' approval is required because the merger consideration consists of more than 20% of the acquirer's outstanding shares or voting power, less stockholder action may be necessary than in an exchange offer. This is because the issuance of shares in excess of 20% of the acquirer's outstanding shares or voting power is generally governed by stock exchange listing requirements.

For example, under NYSE and NASDAQ rules the minimum acquirer stockholders' vote required to issue in excess of 20% of the acquirer's pre-issuance outstanding shares or voting power is a majority of the "votes cast" for the proposal at the meeting or by proxy. This vote typically requires action by the holders of a lower percentage of the acquirer's shares than is required by the minimum tender condition in the first step of a two-step merger (which, even if a medium-form merger is available, is typically at least a majority of the outstanding shares). The reason that a majority of the outstanding shares requires action by more stockholders than a majority of the votes cast is that when calculating a majority of the votes cast, stockholders that are not present or represented by proxy at the stockholders' meeting do not count.

However, if the acquirer needs to amend its certificate of incorporation to increase its authorized but unissued common stock, as is often the case in a one-step merger of equals or other large stock-for-stock merger, there is unlikely to be a difference in the number of shares required to be tendered in the exchange offer as compared to the number of shares that would be required to vote in favor of the merger in a one-step merger. This is because a certificate of incorporation amendment would also require the approval of the holders of at least a majority of the acquirer's outstanding shares.

LONG REGULATORY REVIEW PERIOD

If US or foreign antitrust or other regulatory review is required, exchange offers may have disadvantages. Exchange offers cannot close until all necessary regulatory approvals are obtained. This effectively means that any of Company A's and Company B's fiduciary outs (for example, the target company's board's right to withdraw its recommendation in favor of the transaction or right to terminate the merger agreement to accept a superior proposal) will continue until the receipt of the required regulatory approvals. For additional information on fiduciary-out provisions in public merger agreements, see Practice Notes, No-Shops and Their Exceptions: Fiduciary Outs (8-386-1078) and What's Market: Fiduciary Out (5-386-5737).

By contrast, in a one-step stock-for-stock merger, the fiduciary out terminates when stockholder approval is obtained at the stockholders' meeting, typically within four to six months after signing. Therefore, if the merger parties anticipate a long regulatory review period that may exceed four to six months, a one-step merger may be the preferable structure for the acquirer.

THIRD-PARTY CONSENTS

In a large stock-for-stock merger, typically the acquirer is the survivor or is not one of the entities that is involved in the merger (for example, if the merger is structured as a reverse subsidiary merger) which minimizes issues caused by anti-assignment and change-of-control provisions (see Practice Note, Due Diligence for Public Mergers and Acquisitions: Anti-Assignment and Change of Control Clauses (9-382-1874)).

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In a double dummy dual exchange offer two-step merger, however, both merger parties (Company A and Company B) are involved in the mergers and become subsidiaries of Holdco, so the merger parties must consider whether there are any anti-assignment or change-of-control provisions in Company A's and Company B's important contracts or permits, or as a result of the application of laws, that may be triggered by this new transaction structure. The double reverse mergers used in this structure therefore potentially double the amount of third-party consents that the merger parties may need to obtain to avoid breaching contracts or violating permits.

TENDER OFFER RULES CONSTRAINTS

If the transaction involves any actions that may violate the tender offer rules, a one-step merger may be the preferable structure. Situations that may violate the tender offer rules, include:

- **Controlling stockholder side deals.** Although unusual in a merger of equals or other large stock-for-stock merger, if a target company has a controlling stockholder that will receive a side deal in connection with the transaction (for example, a commercial or other agreement that is not specifically exempted by the safe harbor of Rule 14d-10(d) of the Exchange Act (17 C.F.R. § 240.14d-10(d)) which generally exempts certain specified compensatory arrangements), the side deal may be viewed as additional merger consideration that violates the best price rule under Rule 14d-10(a)(2) of the Exchange Act (17 C.F.R. § 240.14d-10(a)(2)). The best price rule requires that the consideration (whether cash or stock) paid for securities tendered in a tender offer must be the highest consideration paid to any other stockholder for stock tendered in the tender offer. This rule basically prohibits an acquirer from paying a controlling stockholder more merger consideration than that paid to other stockholders in the tender offer. For additional information on the best price rule, see Practice Note, Tender Offers: Overview: All-Holders/Best Price Rules (1-382-7403).
- **Open market purchases.** While unlikely to occur, if the acquirer or certain of its affiliates or other specified persons make open market purchases of either target company's stock outside of the exchange offers, these purchases may violate Rule 14e-5(a) of the Exchange Act (17 C.F.R. § 240.14e-5(a)). Rule 14e-5(b) of the Exchange Act provides that the bidder, its affiliates, certain advisors, and other persons acting in concert with any of them (described as "covered persons" by the SEC) may not purchase securities sought in the tender offer or related securities (securities convertible into, exchangeable for, or exercisable for the subject securities) unless the purchase is part of the tender offer, subject to certain limited exceptions (17 C.F.R. § 240.14e-5(b)). This rule is intended to prevent fraud and market abuse by prohibiting the acquirer from negotiating side deals with certain stockholders while the tender offer is open.
- **Foreign private issuers.** Sometimes, due to conflicts with the securities laws of a non-US jurisdiction, an acquirer is unable to make a tender offer available to all of the holders of the target company's stock. If that tender offer is not exempted from conflicting with the US tender offer rules by the exemptions adopted in the SEC's cross-border rule releases in 1999 (Rel. Nos. 33-7759 and 34-42054) and 2008 (Rel. Nos. 33-8957 and 34-58597), not making the exchange offers available to all Company A and Company B stockholders may violate the "all holders" rule under Rule 14d-10(a)(1) of the Exchange Act (which requires that a tender offer be open to all stockholders of the class of securities subject to the tender offer) (17 C.F.R. § 240.14d-10(a)(1)). For more information on the exemptions applicable to cross-border tender offers, see Cross-Border Tender Offers and Other Business Combinations Exemptions (1-500-6746).

IDEAL TRANSACTION CANDIDATES

The double dummy dual exchange offer two-step merger structure is suitable in situations where:

- The proposed transaction is a merger of equals or other large stock-for-stock public merger that, if structured as a one-step merger, would require a stockholder vote of both merger parties' stockholders.
- The merger parties do not anticipate a long or complicated regulatory review, or the merger parties are in industries that are sufficiently "fragmented" (for example, software, biotech, certain categories of healthcare providers, and certain manufacturing sectors), such that a merger is unlikely to raise significant antitrust issues.
- Neither merger party has any material contracts or permits that contain anti-assignment or change-of-control provisions that would require third-party consents that are likely to be difficult or costly to obtain.
- The merger parties are organized in states that recognize medium-form mergers (or a top-up option without the acquirer's stockholders' approval is possible). However, even if a long-form merger is necessary, the acquirer may still prefer this structure because it provides certainty over closing sooner than is possible in a one-step merger.
- Tax-free treatment is not possible in a conventional forward or reverse, one-step merger due to the percentage of cash comprising the merger consideration.

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