

Index

- Acquisition agreement, 55–66
 - key elements of, 55–61
 - closing conditions, 58
 - covenants, 58
 - deal consideration, 57
 - financing risk, 60
 - indemnities, 61
 - no material adverse effect protection, 59–60
 - public company merger, topping, 61
 - representations and warranties, 57–58
 - structure, 55–57
 - termination rights, 59
 - solving problems and managing risk, 62–65
 - closing condition, 63
 - compensating buyer for losses, 62–63
 - risk to buyer in exercising protections, 63–64
 - “rough justice,” 64
 - timing of protection, 64–65
- Acquisitions, restriction on, 36–37
- Activism, restriction on, 37–38
- Aggregate materiality, 137–139
- Anti-bribery laws, European, 18–19
- Anti-collusion provisions, 26
- Antitrust and other regulatory approvals, 133–134
- Appraisal rights, 143–145

- Breakup fees, fiduciary out, 233–238
 - amount of, 237–238
 - triggers for, 233–236
 - change of recommendation, 234
 - fee tail, 234–236
 - shareholder vote-down, 236
 - termination, 234

- Carve-outs, in MAE provisions, 165–170
- Closing conditions, 58, 94–95, 131–148
 - antitrust and other regulatory approvals, 133–134
 - appraisal rights, 143–145
 - compliance with covenants, 140–141
 - due diligence, 147
 - employment agreements, 146
 - injunctions and litigation, absence of, 142–143
 - legal opinions, 145–146
 - overview, 131–132
 - representations and warranties, accuracy of, 134–140
 - aggregate materiality, 137–139
 - ignoring materiality qualifiers in representations, 136–137
 - level of, 134–136
 - testing of, 139–140
 - shareholder approval, 132–133
 - third-party approval, receipt of, 141
- Closing date, purchase price adjustments, 72–76
- Collars, 68, 70–72
 - fixed exchange ratio structure, 70–71
 - fixed value structure, 71–72
- Collusion and bidder groups, restrictions on, 26–28
- Confidential information
 - carve-outs from the scope of, 14–17
 - already in buyer's possession or received from appropriate third-party source, 15–16
 - generally known by the public, 14–15
 - independently developed by buyer, 16–17
 - definition of, 13–14
- Confidentiality agreements, 8–29, 40–41
 - confidential information
 - carve-outs from the scope of, 14–17
 - definition of, 13–14
 - limits on, 22–23
 - disclosure, restrictions on, 10–11
 - disclosures required by law, 17–19
 - due diligence, 9–10
 - effect on hostile tender offers, 40–41
 - enforcement, 23–24
 - expiration of, 25–26
 - liability for representatives, 24–25
 - process control through, 26–29
 - collusion and bidder groups, restrictions on, 26–28
 - M&A process information, disclosure of, 28–29
 - return or destroy, 19–21
 - use, restrictions on, 11–13
- Consideration, types of, 67–68
 - cash or stock, 67
 - fixed or contingent, 68

- Contingency provisions, financing, 188–199
 - financing condition, 190–191
 - no financing provision, 189–190
 - reverse financing failure breakup fee, 191–198
 - implementing, 193–195
 - size of, 197–198
 - two-tiered, 195–197
- Contingent value rights (CVRs), 83–84
- Covenants, 58, 117–130
 - access, 127–128
 - antitrust and regulatory approval, 121–127
 - “get the deal done,” 120–121
 - limits on, 128–129
 - in M&A negotiations, 117
 - operating, 117–120
 - other, 129
- Deal-making in practice, 1–6
 - litigation endnotes, 5–6
 - the market, 4–5
 - sample provisions, 5
 - war stories, 3–4
- Debt and/or cash adjustments, 73–76
- Debt commitment letter, 183–184
- Debt financing, 202–205
- Disclosure schedules, 102–105
- Dispute resolution, 273–279
 - provisions, types of, 273–275
 - court, 275
 - governing law, 273
 - litigation or arbitration, 274
 - location, 275
 - waiver of jury trial, 275
 - public vs. private company deals, 275–277
 - private company deals, 277
 - public company deals, 275–277
- Double materiality, 136
- Drop-dead date, 149–152
- Earn-outs, 78–83
- EBITDA, 60, 80, 178
- Employment agreements, 146
- Equity and debt commitment letters, 181–185
 - debt commitment letter, 183–184
 - equity commitment letter, 182–183
 - limited fund guarantee, 183
 - private equity deal structures, 181–182
- Equity financing, 200–202
- Escrow, 248–251
- Exchange Act Rule 10b-5, 50, 89, 92, 110
- Exclusivity agreements, 41–48
 - deals with other parties, prohibition on, 42–43
 - “fiduciary outs” in, 43–45
 - mutual exclusivity, 47–48
 - no obligation to execute definitive documentation, 47
 - obligation to negotiate in good faith, 46
 - period, 45–46
 - scope of damages, 47
- Expense reimbursement, 238–241
- Fiduciary out, 61, 152–155
- Fiduciary out breakup fees, 233–238
 - amount of, 237–238
 - triggers for, 233–236
 - change of recommendation, 234
 - fee tail, 234–236
 - shareholder vote-down, 236
 - termination, 234
- Financing covenants, 211–215
- Financing risk, 60, 187–216
 - damages, 205–207
 - liquidated, 205–207
 - financing contingency provisions, overview of, 188–199
 - financing condition, 190–191
 - no financing provision, 189–190
 - no further liability, 199
 - reverse financing failure breakup fee, 191–198
 - walk right, 198
 - financing covenants, 211–215
 - financing provisions, history of, 187–188
 - marketing periods, 208–211
 - no recourse against private equity buyer, 207–208
 - specific enforcement, 199–205
 - debt financing, 202–205
 - equity financing, 200–202
- Fixed exchange ratios, 68–69
- Fixed price, 69–70
- Flex terms, 213
- “Force the vote” provision, 155, 223
- Form 8-K (SEC), 50
- Go-shops, 230–233
- Indemnities, 61, 95–96, 245–271
 - amounts, limitations, and calculations, 255–262
 - caps on recovery, 259
 - deductibles and “dollar-one” thresholds, 255–259
 - measuring loss, 260–262
 - per claim de minimis exceptions, 255
 - claims, remedies, and related issues, 266–269
 - exclusive remedy, 268–269
 - joint and several liability, 269
 - sandbagging and closing over breaches, 266–268
 - escrow, 248–251
 - in M&A negotiations, 245–248
 - overview, 245–246
 - types of, 246–247
 - representations, 263–266
 - reading out qualifiers, 263–265
 - when representations are made, 265–266
 - survival periods, 251–255
- Injunctions and litigation, absence of, 142–143

- Joint and several liability, 269
- Knowledge qualifiers, 98–101, 264–265
 actual and constructive knowledge, 100–101
 knowledge persons, 100
 testing, 99–100
- Letters of intent (LOIs), 48–51
- Limited fund guarantee, 183
- Liquidated damages, 205–207
 cap on damages, 206–207
 sole and exclusive remedy, 205–206
- Loss, measuring, 260–262
 combining indemnities and adjustments, 262
 inclusions and exclusions, 260–261
 offsets, 261–262
- M&A deals, structuring, 281–308
 appraisal rights, 303
 asset purchase, 281–290
 approvals, 288–290
 assets, 282–285
 liabilities, 286–288
 building blocks for, 281
 merger, 292–294
 anti-assignment clauses, 294
 binding share exchanges, 294
 shareholder approval, 293
 triangular, 293–294
 stock purchase, 290–291
 change of control, 291
 signing, 291
 tender offer, 294–300
 complex structuring, 301–302
 dual-track structures, 300
 vs. merger, 297–300
 retaining target as separate subsidiary, 300–301
 squeeze-outs, 295
 top-up options, 295–297
- M&A process information, disclosure of, 28–29
- Match rights, 227–229
- Material adverse change (MAC). *See* Material adverse effect (MAE)
- Material adverse effect (MAE), 59–60, 124–125, 135–136, 137, 155, 161–180
 enforcing no-MAE protection, 176–177
 closing condition, 176–177
 representation bring-down condition, 177
 implementing MAE rights, 170–176
 closing condition vs. representation bring-down condition, 170–172
 implementation, 172–176
 interpreting provisions, 162–170
 contractual definitions, 162–170
 judicial interpretations, 162
 provisions in M&A negotiations, 161–162
 definition, 161–162
 types of, 162
 quantitative, 177–178
- Materiality qualifiers, 97, 263–264
- Memoranda of understanding (MOUs), 48–51
- Merger, 292–294
 anti-assignment clauses, 294
 binding share exchanges, 294
 shareholder approval, 293
 triangular, 293–294
- Most favored nation provisions, 39–40
- No-MAE options, 172–177
 combined no-MAE representation and stand-alone condition, 175–176
 enforcing no-MAE protection, 176–177
 closing condition, 176–177
 representation bring-down condition, 177
 No-MAE representation only, 172–174
 stand-alone no-MAE condition only, 174
- No-poach provisions, 33–35
 protecting target employees, 33–34
 scope of, 34–35
- No-shop provisions, 211, 217–218
 private, 218
 in public mergers, 217
 responsibility for advisors, 218
 restrictions in, types of, 219–226
 changing recommendation, 221–223
 discussions, negotiations, and diligence, 219–221
 signing competing deals, 223–224
 solicitation, 219
 superior proposal, definition of, 224–226
- Predeal process, overview of, 7–8
- Private equity deal structures, 181–182
- Post-closing true-up, 77–78
- Public company merger, topping, 61, 217–243
 expense reimbursement, 238–241
 fiduciary out breakup fees, 233–238
 amount of, 237–238
 triggers for, 233–236
 go-shops, 230–233
 match rights, 227–229
 no-shop provisions, overview of, 217–218
 restrictions in no-shop provisions, types of, 219–226
 changing recommendation, 221–223
 discussions, negotiations, and diligence, 219–221
 signing competing deals, 223–224
 solicitation, 219
 superior proposal, definition of, 224–226
- Purchase price, 67–85
 closing date adjustments, 72–76
 consideration, types of, 67–68
 cash or stock, 67
 fixed or contingent, 68
 contingent value rights (CVRs), 83–84
 earn-outs, 78–83

- Purchase price (*continued*)
- incentives, regulating, 76–77
 - post-closing true-up, 77–78
 - stock deals, 68–72
 - collars, 70–72
 - fixed exchange ratios, 68–69
 - fixed price, 69–70
- Purchase price adjustments, 65, 72–76
- Quantitative MAEs, 177–178
- Reading out qualifiers, 106–108
 - for bring-down purposes, 107–108
 - for indemnity purposes, 108
- Release triggers if target is “in play,” 39
- Representations and warranties, 57–58, 87–116
 - buyer’s, 92–93
 - form of, 87–88
 - functions of, 93–96
 - closing conditions and termination rights, 94–95
 - due diligence, 94
 - indemnity, 95–96
 - obligation to update, 111–112
 - qualifications to, 96–111
 - disclosure schedules, 102–105
 - drafting pitfalls, 109
 - knowledge, 98–101
 - materiality, 97
 - protective provisions, 109–111
 - reading out, 106–108
 - timing, 105–106
 - scope of seller’s or targets’ representations, 89–92
 - main points, 90
 - when representations are made, 89
- Reverse breakup fee, 60, 191–198, 206–207
 - implementing, 193–195
 - size of, 197–198
 - two-tiered, 195–197
- Reverse Morris Trust, 301
- Sandbagging and closing over breaches, 266–268
- Securities and Exchange Commission (SEC), 8, 50, 57, 88, 96, 102, 104, 141, 146, 150
- Setting up the deal, 7–31, 33–54
 - confidentiality agreements, 8–29
 - confidential information, 13–17, 22–23
 - disclosure, restrictions on, 10–11
 - disclosures required by law, 17–19
 - due diligence, 9–10
 - enforcement, 23–24
 - expiration of, 25–26
 - liability for representatives, 24–25
 - process control through, 26–29
 - return or destroy, 19–21
 - use, restrictions on, 11–13
 - key provisions and agreements, 33–54
 - confidentiality agreements, effect on hostile tender offers, 40–41
 - exclusivity agreements, 41–48
 - most favored nation provisions, 39–40
 - no-poach provisions, 33–35
 - standstill agreements, 35–41
 - term sheets, 48–51
 - predeal process, overview of, 7–8
- Shareholder approval, 132–133
- Special purpose vehicle (SPV), 56, 125, 126, 181, 188, 208, 292
- Standstill agreements, 35–41
 - acquisitions, restriction on, 36–37
 - activism, restriction on, 37–38
 - release triggers if target is “in play,” 39
 - waivers, restriction on, 38–39
- Stock purchase, 290–291
 - change of control, 291
 - signing, 291
- Survival period, 251–255
- Tender offer, 294–300
 - complex structuring, 301–302
 - capital-track structures, 300
 - vs. merger, 297–300
 - retaining target as separate subsidiary, 300–301
 - squeeze-outs, 295
 - top-up options, 295–297
- Term sheets, 48–51
 - nonbinding, 48–50
 - required public disclosure, 50–51
- Termination rights, 59, 63, 149–160
 - change in recommendation and fiduciary out, 152–155
 - damages following termination, 157–159
 - drop-dead date, 149–152
 - failure of representations and covenant compliance, 155–156
 - forward-looking aspects of, 156–157
 - overview, 149
- Third-party approvals, receipt of, 141
- Timing qualifiers, 105–106
- Topping a public merger. *See* Public company merger, topping.
- Waivers, restriction on, 38–39
- Willful or intentional breach, 157–158
- Working capital adjustments, 73–76