INSIDE THE MINDS

M&A Deal Strategies

Leading Lawyers on Conducting Due Diligence, Negotiating Representations and Warranties, and Succeeding in a Post-Recession Market

2015 EDITION

ASPATORE

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Looking Ahead:
The State of M&A in 2015

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Introduction

Companies are often spurred to engage in mergers and acquisitions (M&A) in the hopes of creating growth, unlocking shareholder value, revising business strategies, and/or better coordinating resources. These efforts are affected by ever-changing political and economic factors. In the sections below, we highlight some of the factors we believe will impact M&A in 2015.

Market Outlook

Though the global economy is not as robust as it was in 2006, generally the world economy has found an equilibrium and may be considered stable. According to the International Monetary Fund, the global economy is forecasted to grow 3.3 percent in 2014 and 3.8 percent in 2015.[1] It should be noted that economic growth is not evenly distributed throughout the globe. The numbers reflect that the global economy is recovering from the Great Recession but hitting a few speed bumps in certain regions.

The United States

The economy of the United States, for one, has picked up steam and is showing progress. In the first half of 2014, 70 percent of companies in the S&P 500 beat earnings estimates. As of the third quarter of 2014, the Nasdaq Composite and the S&P 500 were up 7.59 percent and 8.34 percent, respectively.[2] Furthermore, in the first eight months of 2014, the US economy, on average, added 215,000 jobs. This number represents an increase of more than 20,000 jobs per month over the average monthly employment gains posted by the US economy in 2013. As of August 2014, the unemployment rate hovered at 6.1 percent, down from the recession high of 10 percent in October of 2009. It is anticipated that the job growth occurring in 2014 will also reduce the number of underemployed workers

[1] INT'L MONETARY FUND. WORLD ECONOMIC OUTLOOK OCTOBER 2014 - LEGACIES, CLOUDS AND UNCERTAINTIES (2014), *available at* http://www.imf.org/external/pubs/ft/weo/2014/02/pdf/text.pdf.

[2] T. Rowe Price, *Third Quarter 2014 Market Wrap-Up*, T.ROWEPRICE, http://individual.troweprice.com/public/Retail/Planning-&-Research/T.-Rowe-Price-Insights/MarketAnalysis/Quarterly-Wrap-Ups (last visited Dec. 10, 2014).

and the number of individuals who exit the workforce prior than they planned due to the unavailability of suitable employment opportunities after the Great Recession.[3]

Other Economies

On the other hand, China's economy is expected to grow at a rate of about 7.3 percent this year, representing the slowest growth rate in five years.[4] Also, perhaps as a result of the uncertainty and tension between the Ukraine and Russia, Europe is stagnating. France, Spain, and Italy endure unemployment rates in excess of 10 percent.[5] Germany, the largest economy in the Eurozone, is predicting meager growth of 1.2 percent for the year and its economy contracted in the second quarter of 2014.[6]

M&A Activity

Despite the uneven global recovery, according to Bloomberg, the third quarter of 2014 enjoyed the highest third quarter M&A deal volume results in the past seven years, with deal volume on a global basis reaching $888.9 billion. The Western Hemisphere accounted for more than half of that deal volume.[7] In addition, the number of deals valued at over $10 billion reached twelve. That represents a 300 percent increase in such transactions over the

[3] Dr. Patricia Bukley, *United States Back on Track after First-quarter Detour* , DELOITTE UNIVERSITY PRESS (Oct. 21, 2014), http://dupress.com/articles/global-economic-outlook-q4-2014-united-states/.

[4] *See China's economic growth falls to lowest in 5 years*, ASSOCIATED PRESS. (Oct. 21, 2014), http://www.theguardian.com/business/2014/oct/21/chinas-economic-growth-falls-to-lowest-in-5-years.

[5] Catherine Bosley, *Europe's Glacial Growth Lowers Prospects for Job Seekers*, BLOOMBERG (Oct. 28, 2014), http://www.bloomberg.com/news/2014-10-28/europe-s-glacial-growth-lowers-prospects-for-doubting-jobseekers.html.

[6] Barbara Miller, *German economy could lead Europe back into recession*, ABC (Oct. 28, 2014), http://www.abc.net.au/news/2014-10-28/german-economy-could-lead-europe-back-into-recession/5847416. *See also* Dr. Alexander Borsch, *Eurozone Recovery stalled*, DELOITTE UNIVERSITY PRESS (Oct. 21, 2014), http://dupress.com/articles/global-economic-outlook-q4-2014-eurozone/.

[7] BLOOMBERG, GLOBAL M&A MARKET REVIEW FINANCIAL RANKINGS 1ST 3Q 2014, *available at* http://www.bloomberg.com/professional/content/uploads/sites/2/2014/10/Bloomberg-3Q-2014-MA-Financial-Rankings.pdf.

prior year.[8] As one *New York Times* article noted earlier this year, "Shareholder beware: M.&A. mania is back."[9]

The calendar year 2014 has been characterized by less overall number of transactions but an increase in large cap deals with huge deal values.[10] In fact, global M&A reached seven-year transaction value highs in the second quarter of 2014, with the United States accounting for half of the global volume based on deal value.[11] For example, Comcast's acquisition of Time Warner Cable, a deal announced on February 13, 2014, was valued at $69.8 billion. Also, AT&T Inc.'s acquisition of DirectTV Group Inc., announced on May 18, 2014, was valued at $67.1 billion.[12] These types of mega deals increase market confidence and should result in additional M&A activity.[13]

2015

For 2015 we expect a continued increase in global M&A activity. At least in the United States, such M&A activity will not be spurred by tax considerations (which are discussed below), but will instead be led by a surge of middle market deals (with deal values below $1 billion) focused on synergistic acquisitions.[14] According to a recent survey conducted by EY, "the number of executives that view the global economy as stable has almost doubled in the past 12 months." Despite conflicts in the Middle East, tensions between Russia and the Ukraine, and Ebola scares in Africa as well as the United States, a full 40 percent of these executives were interested in pursuing an M&A transaction within the next twelve months. More than 80 percent of the transactions these executives contemplated in the next twelve months were expected to have a deal

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[8] *Id.*
[9] Jeff Sommer, *Merger Fever Can be a Menace for Shareholders*, N.Y. TIMES (Jun. 21, 2014), http://www.nytimes.com/2014/06/22/your-money/merger-fever-can-be-a-menace-for-shareholders.html?_r=0.
[10] *See* Alexa Davis, *No Slowdown in Sight for 2014's M&A Frenzy*, FORBES (Jun. 24, 2014), http://www.forbes.com/sites/alexadavis/2014/06/24/no-slowdown-in-sight-for-2014s-ma-frenzy/.
[11] Bloomberg Global M&A Market Review Financial Rankings 1H 2014.
[12] *2014's Biggest Announced Mergers and Acquisitions*,: FORBES, http://www.forbes.com/pictures/gfhd45fkk/comcast-time-warner-cable/(last visited Nov. 23, 2014).
[13] *Global Capital Confidence Barometer, October 2014, 11th Edition*, EY http://www.ey.com/GL/en/Services/Transactions/EY-capital-confidence-barometer-m-a-outlook?gclid=CJDE8-fBxcECFQMT7Aoda2gAQw (last visited Nov. 20, 2014).
[14] *Id.*

value of $250 million or less. The majority of these deals are meant to enhance the core business of the acquiring company or to increase the products and services provided by the acquiring company pursuant to the acquisition of a complementary business.[15]

Tempering the Surge in Tax-Driven Deals

Given the relative stability of the global and US economies, for 2015 we are more focused on the impact of legislative and regulatory action on M&A activity.

One recent regulatory action which we expect to have a chilling effect on M&A activity is a recent notice published by the United States Department of the Treasury (US Treasury) and the Internal Revenue Service (IRS). That notice points to the possibility that the US government may enact legislation or regulations reducing the tax benefits of tax inversions, a type of M&A transaction. In a tax inversion, concurrently with a merger or acquisition of a non-US company, a US-based purchaser redomiciles to the jurisdiction of the non-US target company where, typically, a lower corporate tax rate applies. After a tax inversion, only profits earned in the United States are subject to the US corporate income tax rate. Generally, the United States imposes a 35 percent corporate federal tax rate on income earned by US companies within the United States and abroad, though, with respect to non-US income, a US company can delay paying taxes on such income until such income is paid or repatriated into the United States as a dividend or distribution to the US company. Until recently, tax inversions were a popular part of global M&A activity because such transactions usually translated into substantial and ongoing tax savings for the purchaser.

Since the first tax inversion was consummated in the early 1980s, the IRS has introduced various rounds of regulation to discourage US-based companies from re-incorporating in a different jurisdiction. Beginning in 2004, companies desiring to invert and reincorporate in a non-US jurisdiction were required to have "substantial business activity" in the country of reincorporation. Thereafter, the IRS:

1. Determined that "substantial business activity" generally required a

[15] *See Id.*

company to have at least 25 percent of its assets, income and employees in the new non-US jurisdiction and
2. Required that the former owners of the US entity own less than 80 percent of the new non-US entity.[16]

The latest salvo against tax inversions came in the form of a notice published by the US Treasury and the IRS, which aims to, among other things, prevent

1. Inverted companies from using "creative" loans to access cash earned by a foreign subsidiary without paying taxes on such cash,
2. The sale of shares in a foreign subsidiary with substantial earnings from a US entity to a non-US entity to avoid paying taxes on such cash, and
3. The transfer of assets located in the US to a foreign company to avoid paying taxes on such assets.

In addition, the notice makes it harder for US entities to consummate a tax inversion by strengthening the requirement that the former shareholders of the US company own less than 80 percent of the non-US surviving entity.[17] If the former shareholders of the US company own at least 60 percent but less than 80 percent of the non-US surviving entity, then, although the United States will acknowledge that the surviving entity is not a US entity, such entity may be subject to other unfavorable tax consequences.[18] In each case, the new stricter guidelines apply to tax inversions closing on or after September 22, 2014.

The chilling effect of the notice on M&A activity was felt immediately. For one, the merger of AbbVie Inc., a US company, and Shire PLC, a company based in the United Kingdom, was terminated in October of 2014 after the board of directors of AbbVie determined that the US Treasury's notice and new interpretation of US tax rules eliminated tax savings related to the

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[16] David Gelles, *New Corporate Tax Shelter: A Merger Abroad*, N.Y. TIMES (Oct. 8, 2013), http://dealbook.nytimes.com/2013/10/08/to-cut-corporate-taxes-a-merger-abroad-and-a-new-home/?_php=true&_type=blogs&_r=0.
[17] *Fact Sheet: Treasury Actions to Rein in Corporate Tax Inversions*, U.S. DEP'T TREAS. (Sept. 22, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2645.aspx.
[18] *See* Gelles, *supra* note 16.

proposed tax inversion.[19] AbbVie's chief executive officer stated: "The Company's decision was based upon its assessment of the September 22, 2014 notice issued by the U.S. Department of Treasury, which re-interpreted longstanding tax principles in a uniquely selective manner designed specifically to destroy the financial benefits of these types of transactions. The notice introduced an unacceptable level of risk and uncertainty given the magnitude of the proposed changes and the stated intention of the Department of Treasury to continue to revise tax principles to further impact such transactions." AbbVie agreed to pay Shire a $1.64 billion breakup fee. Other deals have also stalled.[20]

The US Treasury's press release also indicated that additional regulatory action may be forthcoming. Specifically, the notice also included a quote from the Secretary of the Treasury that highlighted the fact that M&A transactions aimed at reducing the tax burden on US-based companies will be facing much tougher agency scrutiny: "Treasury will continue to review a broad range of authorities for further anti-inversion measures as part of our continued work to close loopholes that allow some taxpayers to avoid paying their fair share."[21]

Delaware Amendments to the Delaware General Corporation Law

Not all legislative developments are expected to dampen M&A activity. Recently, Delaware enacted several changes to the Delaware General Corporation Law (DGCL) and the Delaware Code. These amendments are generally expected to be positive developments for M&A activity in the United States. In addition, the amendments have the cumulative effect of ensuring that Delaware stays at the vanguard of corporate innovation and remains the venue of choice for companies formed or incorporated in the United States.[22]

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[19] *See Announcement of Termination of Proposed AbbVie and Shire Transaction*, ABBVIE (Oct. 20, 2014), http://abbvie.mediaroom.com/index.php?s=20295&item=122549.

[20] *Factbox: Another U.S. tax 'inversion' implodes, pending deals dwindle*, REUTERS (Oct. 24, 2014), http://www.reuters.com/article/2014/10/24/us-usa-tax-pending-inversions-idUSKCN0ID1VR20141024.

[21] *Treasury Announces First Steps to Reduce Tax Benefits of Corporate Inversions*, U.S. DEP'T TREAS. (Sept. 22, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2647.aspx.

[22] According to the Division of Corporations of the Secretary of State of the State of Delaware, over 50 percent of US publicly traded companies and 64 percent of Fortune 500 companies are incorporated in Delaware.

Section 251(h) of the DGCL

Prior to the enactment of Section 251(h) of the DGCL, acquisition transactions were often structured as a two-step process that required the purchaser to first complete a tender or exchange offer for all outstanding securities, and then, upon consummation of the tender or exchange offer, a merger would be used to complete the acquisition. After the tender or exchange offer, if the purchaser did not own at least 90 percent of the outstanding stock of the target company, the purchaser could not avail itself of the short form merger provisions of Section 253 of the DGCL, which do not require the controlling purchaser to seek stockholder approval. Though such merger was sure to be approved because the purchaser controlled a sufficient number of votes, such purchaser was required to delay completion of the transaction until the steps necessary to complete a long form merger, including mailing a proxy statement and holding a stockholder meeting to approve the merger, were completed. M&A attorneys employ various techniques such as "top-up options" and "dual-track structures" to shorten the amount of time required to consummate a two-step merger. Section 251(h) of the DGCL will make these techniques unnecessary in certain instances by permitting the purchaser to sidestep the proxy process and stockholder vote.

Section 251(h) of the DGCL became effective on August 1, 2013 and was thereafter amended effective August 1, 2014. In connection with the acquisition of a target corporation whose shares are listed on a national securities exchange or held of record by more than 2,000 persons, Section 251(h) of the DGCL permits a purchaser who has completed a successful tender or exchange offer and owns a certain percentage of the target company's securities to, subject to certain conditions, effect a short form merger without requesting the vote of minority stockholders (unless such vote is expressly required by the certificate of incorporation of the target corporation). Specifically, merger agreements entered into after August 1, 2013 may include a provision electing for Section 251(h) of the DGCL to apply and eliminating the need for a stockholder vote for a second-step merger following consummation of a tender or exchange offer.

In the first year since the enactment of Section 251(h), purchasers used the new provision to complete more than thirty different tender offers in an

expedited manner.[23] We expect to see an increase in the use of Section 251(h) for merger transactions involving a public target company incorporated in Delaware. Also, looking ahead at 2015 and the subsequent years, we would not be surprised if other state legislatures soon follow Delaware's example and enact legislation meant to streamline M&A transactions involving a tender or exchange offer.

Sections 141(f) and 228(c) of the DGCL

Concurrent with the enactment of Section 251(h) of the DGCL, the Delaware legislature also amended Sections 141(f) and 228(c) of the DGCL. Effective as of August 1, 2014, these sections of the DGCL now explicitly permit any person (whether or not then a director or a stockholder of a corporation) to provide a consent to an action that will be effective at a future time (including a time determined upon the happening of an event), no later than sixty days after such consent is given. Such consent is deemed to have been given at the effective time so long as the person consenting is then a director or stockholder, as applicable, and has not revoked his consent prior to the deemed effective time. The revisions to these sections codify the standard deal practice of collecting signatures, prior to closing, from persons who will become stockholders or directors pursuant to a transaction.

Section 8106 of the Delaware Code

Section 8106 of the Delaware Code generally provides for a three-year statute of limitations on claims arising from a breach of contract. In contrast, New York law generally provides that claims arising from a breach of contract enjoy a six-year statute of limitation. Section 8106 of the Delaware Code was amended effective August 1, 2014, to permit an action based on a written agreement involving at least $100,000 to be brought within a period specified in such written agreement provided such action is brought prior to the expiration of twenty years from the accruing of the cause of such action. Prior to the amendment, under Delaware law, it was clear that parties had a right to shorten the period for

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[23] David Marcus, *Streamlined tenders get off to a quick start*, DEAL PIPELINE (Nov. 22, 2013), http://www.thedeal.com/content/regulatory/streamlined-tenders-get-off-to-a-quick-start.php.

enforcing breaches of contract claims in an agreement.[24] However, survival periods in excess of three years in any agreement governed by Delaware law were arguably unenforceable.

In the context of an M&A transaction, purchasers often negotiate survival periods in excess of three years for certain representations and warranties, such as representations with respect to title and authority to sign the purchase agreement, provided in a purchase agreement. We expect that the amendment to Section 8106 will result in increased variability of survival periods negotiated in M&A transactions for breaches of representations, warranties and covenants in purchase agreements governed by Delaware law.

Shareholder Litigation Under Scrutiny

Another development that may affect M&A activity has been an increase in the scrutiny of shareholder litigation. In 2007 and 2008, prior to the Great Recession, 44 percent and 54 percent, respectively, of M&A transactions valued at over $100 million resulted in shareholder litigation. After the Great Recession, shareholder litigation increased exponentially. A study of transactions involving public target companies found that in each of the past three years, more than 90 percent of M&A deals valued at $100 million or more resulted in shareholder litigation. In fact, in 2013, 94 percent of announced M&A transactions valued at over $100 million resulted in shareholder litigation. The vast majority of such litigation is often settled before trial.[25]

These statistics reflect a stark reality of today's M&A practice, which operates to discourage potential purchasers and sellers from engaging in M&A transactions. It has become a *fait accompli* that within days of announcing any merger or takeover relating to a public company, a class action will be filed against the public company by some of its shareholders.

[24] *See ENI Hldgs., LLC v. KBR Group Hldgs., LLC*, No. 8075-VCG, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013).

[25] CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS, REVIEW OF 2013 M&A LITIGATION (2013), *available at* https://www.cornerstone.com/CMSPages/GetFile.aspx?guid=73882c85-ea7b-4b3c-a75f-40830eab34b6.

The shareholder actions are usually premised on the argument that the board of directors failed to obtain a fair price and/or followed an unfair process. These suits rarely make it to trial, and instead the vast majority are usually settled via an agreement between the shareholders and the public company pursuant to which the public company agrees to make additional or supplemental disclosures. The benefit of these types of shareholder suits is dubious, given that, in the majority of the shareholder litigation settlements, the price per share paid to the shareholders as consideration for the M&A transaction remains the same. In fact, according to Cornerstone Research, in 2013, only 2 percent of all shareholder suit settlements resulted in a monetary award of more than $5 million.[26] On the other hand, plaintiff's attorneys are usually awarded attorney's fees in connection with the settlement.

Recent statistics seem to imply that courts, especially the Delaware courts (which are the venue of choice for corporate litigation in the United States), are becoming more wary of shareholder litigation that produces little monetary benefit for shareholders. For one, in 2011 and 2012, plaintiffs' attorneys, on average, requested $1.4 million in legal fees. In 2013, that number declined to $1.1 million. In cases where the settlement included no monetary recovery and provided solely for additional disclosures, the average plaintiff's attorney's fees has declined from over $700,000 in 2009 to around half a million dollars.[27]

Moreover, earlier this year, in an Order for Notice and Scheduling a Hearing on Settlement to determine the fairness of a proposed settlement *In re Theragenics Corp. Stockholder Litigation*, the Delaware Court of Chancery required the plaintiff's attorneys to provide, amongst other things:

i. A description of plaintiff's economic interests in the public company and holdings at the time of filing the complaint and at the time of the settlement;
ii. A description of the plaintiff's investment strategy, generally and with respect to the public company;
iii. A description of how counsel was retained including whether

[26] *Id.*
[27] *Id.*

counsel advertised for potential plaintiffs, how the plaintiff came into contact with counsel, whether plaintiff contacted other law firms, whether any referral processes were involved, and any relationship between plaintiff and counsel; and

iv. Details regarding other actions filed by the plaintiff within the past five years, including fees and compensation received by the plaintiff.[28]

The nature and scope of information requested reflect an increased interest with respect to the award of attorney's fees in shareholder litigations on the part of Delaware courts.[29]

ATP Tour, Inc. et al. v. Deutscher Tennis Bund

In addition, a potentially more significant decision affecting attorney's fees in shareholder litigation (and therefore shareholder litigation as a whole) was handed down by the Delaware Supreme Court in *ATP Tour, Inc. et al. v. Deutscher Tennis Bund.*[30] In *ATP Tour*, the court held that "fee-shifting provisions in a non-stock corporation's bylaws can be valid and enforceable under Delaware law." Also known as a "loser pays" provision, fee-shifting provisions require the losing party in a litigation to pay the litigation costs, including attorney's fees, incurred by the prevailing party. Though common in Europe, these types of provisions are generally disfavored in the United States for fear that such provisions will have a chilling effect on legitimate shareholder litigation. Instead, it is the general rule in the United States that each party bears its own cost in litigation.

While *ATP Tour* dealt with the less common non-stock corporations, the same reasoning could apply to a stock corporation. In fact, within one month of the *ATP Tour* decision, it was reported that at least six companies had adopted a fee-shifting provision in their by-laws.[31] As of the date of this

[28] *In re Theragenics, Corp.*,, No. 8790-VCL, 2014 WL 1813792 (Del. Ch. Feb. 21, 2014).
[29] *See* Brian T. Carney & Spencer D. Smith, *Plaintiff's Attorney's Fees in Shareholder Suits Subject to Heightened Scrutiny (In re Theragenics Case),* AKIN GUMP (Mar. 6, 2014), http://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/plaintiff-s-attorney-s-fees-in-shareholder-suits-subject-to.html.
[30] *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).
[31] Tom Hals, *U.S. companies adopt bylaws that could quash some investor lawsuits*, REUTERS (Jul. 7, 2014), http://www.reuters.com/article/2014/07/07/us-usa-litigation-companies-idUSKBN0FC26O20140707.

article, there is no Delaware court decision clarifying that fee-shifting provisions in a stock corporation's bylaws may be valid. Instead, in response to the Delaware Supreme Court's decision in *ATP Tour*, the Delaware State Bar Association proposed a bill that would have limited the applicability of the decision in ATP Tour to non-stock corporations and clarified that bylaw provisions may not impose a financial liability on corporate stockholders.[32] The proposed bill was subsequently withdrawn but it is anticipated that a revised or more tailored version of the bill may be proposed in 2015.

It should be noted that the state of Oklahoma recently enacted legislation requiring that courts with jurisdiction over derivative suits require the losing party to pay the prevailing party's reasonable expenses, including attorney's fees, incurred as a result of the derivative action.[33] Should fee-shifting provisions become acceptable, the number of frivolous as well as meritorious shareholder lawsuits filed in connection with M&A transactions will likely decrease. A decrease in shareholder litigation also lessens litigation risks associated with M&A transactions.

Conclusion

Levels of M&A activity are affected by the general health of the economy and regulatory climate. As we write this chapter, interest rates are low and the US stock markets are healthy, thus permitting purchasers to easily secure debt and equity financing for their acquisitions. Accordingly, in the short term, the slow but steady growth of the global economy and legislative developments in 2014 indicate that M&A activity will moderately increase in 2015, as compared to 2014. However, M&A activity would be negatively impacted by adverse economic developments such as an increase in interest rates. We hope that the economic trends underpinning the increase in M&A activity continue throughout 2015, thus permitting companies to create growth, unlock shareholder value, revise business strategies, and better coordinate their resources by pursuing M&A transactions.

[32] *Fee-Shifting Bylaws: The Current State of Play*, SKADDEN (Jun. 20, 2014), available at http://www.skadden.com/newsletters/Fee_Shifting_Bylaws_The_Current_State_of_Play.pdf.
[33] S.B. 1799, 54th Leg., 2d Sess. (Okla. 2014).

Key Takeaways

- With the stabilization of the economy, both globally and in the United States, anticipate changes in legislative and regulatory action affecting M&A activity. Stay on top of developments relating to the notice published by the US Treasury and IRS regarding possible legislation or regulations reducing the tax benefits of tax inversions. The previous tactic of changing domicile concurrent with a merger or acquisition of a non-US company to apply a lower corporate tax rate may no longer be feasible. The IRS is taking action to close loopholes that allowed some taxpayers to escape paying certain taxes. Become familiar with the IRS requirements to remain eligible to use a tax inversion and make sure clients fit criteria if they wish to use such a tactic. Such requirements include the percentage of shares that must be owned by the surviving non-US entity. Become familiar with all the possible outcomes and consequences your client may face, to steer them to the wisest choices.
- Prepare for an increase in the use of Section 251(h) for merger transactions involving a public target company incorporated in Delaware, since this streamlines M&A transactions. Prepare for other state legislatures to follow Delaware's example and enact similar legislation, affecting your clients incorporated in those states. In connection with the acquisition of a target corporation whose shares are listed on a national securities exchange or held of record by more than 2,000 persons, Section 251(h) permits a purchaser who has completed a successful tender or exchange offer and owns a certain percentage of the target company's securities to effect a short form merger without requesting the vote of minority stockholders. Merger agreements entered into after August 1, 2013 may include a provision electing for Section 251(h) to apply and eliminating the need for a stockholder vote for a second-step merger following consummation of a tender or exchange offer.

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Mr. Kishner concentrates his practice in general corporation law with an emphasis on sophisticated transactional work, including mergers and acquisitions, sports law, private equity, securities law, corporate restructurings and reorganizations, new media law, venture capital, joint venture, entertainment law, corporate finance and lending, intellectual property and licensing, employment law, equity and debt offerings, and syndications in both the public and private context.

Mr. Kishner has handled numerous mergers and acquisitions, both hostile and friendly, on behalf of acquirers, targets, and investment banks. The range of transactions includes proxy contests, joint ventures, self tender offers, third party and spin-offs, taking public companies private, and other forms of corporate restructurings. Mr. Kishner's practice also includes advising financial institutions on regulatory issues and on derivatives and other financial instruments, as well as representation of private equity and venture capital funds and investors in fund formation (onshore and offshore), acquisitions, and sales of portfolio companies. He has successfully structured, negotiated, supervised, and closed many financing and capital raising transactions, including private placements, initial public offerings, PIPEs, hedge fund convertible security investments, secured and mezzanine loan facilities, project finance, workouts, reorganizations, equity and debt restructurings, and negotiation of intercreditor relationships. Mr. Kishner has also represented clients in a number of high-profile senior executive employment and severance agreements and compensation packages as well as numerous corporations in the administration and establishment of employee compensation plans. Corporate boards and audit and special committees also turn to Mr. Kishner for advice on such matters as corporate governance and corporate restructurings.

Mr. Kishner represents a number of professional sports franchises and has acted as primary counsel on several high-profile team acquisitions; cable television and radio contracts; Internet and intellectual property rights; joint ventures; credit facilities; advertising and sponsorship contracts; development and naming rights agreements; franchise transfers and financings; major event and tournament promotions; and seat license agreements for stadiums and arenas. He has acted as lead counsel in all aspects of five major stadium transactions, most significantly the new Yankee Stadium, and also represents financial institutions and bond insurers in stadium finance matters and loans to teams and team owners.

Mr. Kishner's recent sports-related experience includes the representation of the New York Yankees in their joint venture effort with Manchester City to create Major League Soccer's New York City Football Club (NYCFC), and the continuing representation of

the club across a range of transactions. He also recently advised Legends Hospitality in the deal to develop and operate the observation deck at the top of One World Trade Center, and was lead counsel to the New York Yankees and Yankee Global Enterprises in News Corp's 2012 acquisition of 49 percent of the Yankees Entertainment and Sports Network (YES), and 21st Century Fox's ensuing 2014 acquisition, which raised its ownership stake in YES to 80 percent. Mr. Kishner advises clients in transactions throughout North America, South America, Europe (including Eastern Europe), and Asia. His clients are involved in a wide range of industries including sports, e-commerce, real estate, engineering, entertainment, manufacturing, franchise, retail, distribution, consumer products, natural resources, consulting, health care and other service businesses.

Mr. Kishner frequently lectures, and appears on television and radio, on such topics as M&A, private equity, venture capital, sports financing, structured premium finance and life settlements transactions, and executive compensation, among others. Before joining Herrick, Mr. Kishner was an associate in Shearman & Sterling's mergers and acquisitions department where he participated in several high-profile hostile tender offers and numerous public and privately negotiated divestitures and acquisitions.

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