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PENbrief

Smoothing Out Your Back-End (Merger)

A private equity firm seeking to buy a public company has two choices:

- Pursue a one-step merger, in which the PE buyer enters into a merger agreement with the target, and then the target sends a proxy statement to its shareholders and holds a meeting to vote on the merger; or
- Pursue a two-step tender offer, in which (generally after signing a merger agreement) the PE buyer offers to buy shares directly from the public shareholders and then, if the minimum condition to the tender offer (typically more than 50% of the shares are tendered) is satisfied, it acquires the untendered shares in a back-end merger.

The downside of a one-step merger structure is time: it can take three to four months to obtain SEC approval of a proxy statement, mail it to shareholders, and then hold a meeting. The two-step tender offer/back-end merger has the advantage of speed: a buyer can acquire control of the target in 20 business days, and if 90% or more (the standard in Delaware) of the shares are tendered, can acquire all the remaining shares using a short-form merger (which does not require a shareholder meeting). If, however, the buyer cannot acquire enough shares to conduct a short-form merger, it must follow the same proxy process as in a one-step transaction (i.e., distributing a proxy statement and holding a formal shareholder meeting) to obtain all remaining shares.

Because time is the enemy of every buyer of a public company, dealmakers have invented tools to accelerate the second step of a two-step tender offer, including:

- The **top-up option**, in which the target gives the buyer an option to purchase sufficient newly issued shares directly from the target to reach the short-form merger threshold, and
- The **"Burger King"** structure, in which the buyer and target pursue a dual track (both a one-step and a two-step), and then choose the fastest when the number of tendered shares are known.

Neither tool can fit every situation, however. These tactics are of particular interest to private equity buyers as their unique financing needs affect their choice of structure and the value of any tools that compress the deal timing. In a recent *Kirkland M&A Update*, Kirkland partners Daniel Wolf and Jon Ballis discuss other tools dealmakers might use to shorten time required to complete the second step of a two-step takeover, and thereby maximize the time advantage offered by the tender offer structure. To learn more, please see their recent *Kirkland M&A Update*.

If you have any questions about the matters addressed in this *KirklandPEN,* please contact the following Kirkland authors or your regular Kirkland contact.

Daniel E. Wolf
http://www.kirkland.com/dwolf
+1 212-446-4884

Jon A. Ballis, P.C.
http://www.kirkland.com/jballis
+1 312-862-2332

Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
+1 (312) 862-2000