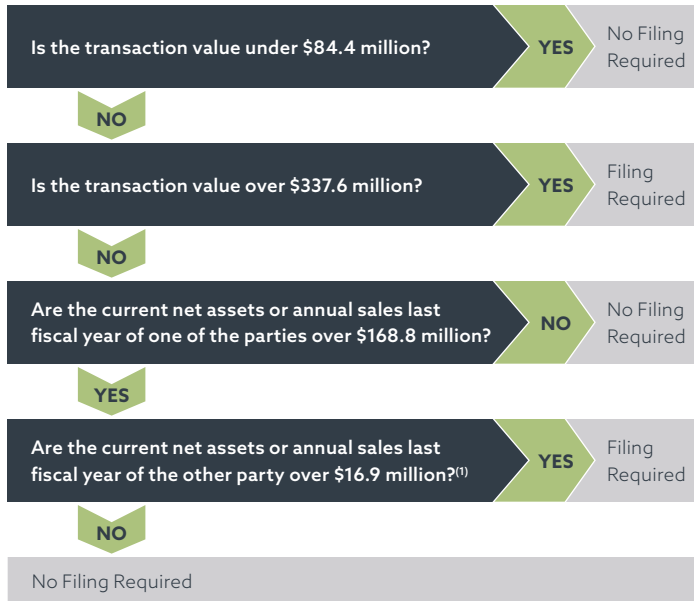


2018 Mergers and Acquisitions Helpful Checklists

HART-SCOTT-RODINO (HSR) NOTIFICATION FLOWCHART



⁽¹⁾ Note: If Buyer is not engaged in manufacturing and has at least \$168.8 million in current net assets or annual sales last fiscal year, then filing required only if Target's current net assets equal or exceed \$16.9 million.

General Note: This contains general rules of thumb; HSR contains multiple important exemptions that can be explained by an HSR expert.

HSR FILING FEES

Transaction Value	\$84.4 – \$168.8 million	At or above \$168.8 – \$843.9 million	At or above \$843.9 million
Fee	\$45,000	\$125,000	\$280,000

MAXIMUM CASH COMPONENT FOR TAX FREE REORGANIZATION

Structure Name	Tax Code Section	Cash	Stock
Reverse Triangular Merger	368	20%	80%
Forward Merger	368	60%	40%
"Double Dummy"	351	No Limit	

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MAJOR LEGAL DUE DILIGENCE AREAS

Corporate

- Certificate of Incorporation; Bylaws
- Subsidiaries/Goodstandings
- Capitalization/Financings
- Option Plans/RSU's/Warrants
- Mergers and Acquisitions

Agreements

- Customers
- Suppliers; Manufacturing
- IP Development
- Loans/Equipment Leases

Intellectual Property

- Patent, Trademark and Copyright
- Assignment of Inventions Agreements
- Inbound/Outbound IP Licenses
- Open Source/Code Quality

Data Privacy Policies

Human Resources

- ERISA/401(k) Filings/ Benefit Plans
- Employment Agreements
- Terminations/Severance
- Labor Relations

Tax

- Federal and State Returns
- Sales/Use Tax
- Audits
- International Tax/Transfer Pricing

Cybersecurity

Environmental

Foreign Corrupt Practices Act/ UK Anti-Bribery Act

Insurance

Litigation

Real Estate

COMMON MERGERS AND ACQUISITIONS DEAL TERMS

Letter of Intent Exclusivity Period

Merger vs. Stock Purchase vs. Asset Purchase

Valuation Levers

- Options/RSUs/Warrants, including any accelerated or roll-over vesting and option exercise proceeds
- Treatment of Cash, Debt

Post Closing Working Capital Adjustment

- One-way or two-way

Contingent Consideration (Earn-out)

- Amount/Term
- What efforts must Buyer exert?
- Indemnity Set-off

Non-Compete Provisions

- Non-competes and non-solicitation term
- Definition of excluded business

Covenants

- Pre-closing operating restrictions on the business
- Post-closing directors and officers insurance

Conditions to Closing

- Hart Scott Rodino/ Anti-trust notification required?
- Customer consents?

Termination

- Termination right if Target does not have stockholder approval by fixed time?

- Break-up fee/Expense reimbursement
- Outside date for termination
- Reverse break-up fee (often anti-trust or Buyer financing)

Indemnity

- Rep and warranty insurance
- Escrow vs. holdback
- General indemnity cap
- Is indemnity limited to escrow/holdback amount?
- Basket vs. deductible
- Reps & warranties survival period and cap amount
- "General" reps & warranties
- "Fundamental representations"
 - Authorization, good standing, capitalization
 - Tax, employee benefits
 - Intellectual property ownership/infringement
- Materiality Scrapes
 - Single Scrape: Once breach is determined, removes materiality qualifiers for purposes of determining damages.
 - Double Scrape: Eliminate materiality qualifiers in evaluating both breach and resulting damages.
- Mini-Baskets
- Anti-'pro-'Sandbagging'
- 10b-5/full disclosure rep?

Choice of Law

Fiduciary Duties in a Change of Control

EVALUATING TRANSACTION STRUCTURE: PRICE, PROCESS AND CONTRACT TERMS

Price:

- **Amount of Consideration**
- **Form of Consideration:** Cash? Stock? Notes? Mix? Fixed, Floating or Collars?
- **Certainty of Consideration**
 - **Financing:** Does Buyer require financing and, if so, is there a financing contingency in the merger contract? What form of assurance from financial institutions is to be provided prior to signing the merger contract?
 - **Regulatory Factors:** Are there antitrust or specialized regulatory concerns that could prevent closing?
 - **Buyer's Business:** If stock is part of consideration, how much diligence on Buyer has been performed? What is Buyer's business outlook?
 - **Contingent Consideration** ("Earn-Out") (Private company target deals only): What are Buyer's requirements/restrictions to affect Target business post-closing?

Process: Balance between pre-signing and post-signing reasonable assurance that price is suitable

- **Pre-Signing:**
 - **Market Check:** Did Target perform a selected or broad-based market check, or not?
 - **Auction:** If actual auction of the business, was Buyer highest bidder?
 - **Conflicts:** Was the process free of the appearance of any conflicts of interest?
- **Post-Signing:**
 - **Fiduciary Out:** Does the merger contract allow for an immediate termination (with fee) if a superior proposal is offered by a third party post-signing?
 - **Go Shop:** Does the merger contract provide for a mandatory shopping period post-signing for Target to seek a better deal? Term sheet or fully negotiated merger agreement required? Bifurcated termination fee?
 - **Reverse Break-up Fee:** (e.g. antitrust)

Contract Terms: Tension between complete certainty of consummation and asymmetric optionality

- **Target Optionality Post Signing**
 - **Fiduciary Out or Force the Vote?** (Force the Vote entails no immediate termination right for superior proposals; only right of directors to change recommendation – deal must then go to Target stockholder vote.) Does adverse recommendation change by Target board trigger Buyer termination right?
 - **Termination Fee:** Amount (generally 2.5-4.5%)? Tail period if either takeover proposal is made and outside date reached or acquisition consummated within certain period of termination?
 - **Match Right** for superior proposal: Terms (updates)?
- **Buyer Optionality Post-Signing**
 - **Rep & Warranty Bring Down at Closing:** No Material Adverse Effect vs. "in all material respects?" Standard MAE carve-outs for Target?
 - Are reps as of the date of signing, or forward looking to include sign to close period? If forward looking, updates required? Cure period allowed?
 - Are reps knowledge qualified and what is definition of knowledge?
 - **Consents:** Regulatory or customer/supplier?
 - **Termination:** Drop dead date?
 - **Post-Closing Liability**

Disclaimer: These truncated checklists are for convenience only prior to consulting legal counsel, are not legal advice, do not create an attorney-client relationship and the reader should consult legal counsel about any information contained herein.

KEY DELAWARE M&A LEGAL STANDARDS

- **Business Judgment Rule:** Duties of good faith, loyalty and care. Objective standard of gross negligence for due care and prudence. *Smith v. Van Gorkom (1985)*
- **Enhanced Scrutiny:** Reasonableness and proportionality in evaluating responses to a proposed change of control. *Unocal Corp. v. Mesa Petroleum Co. (1985)*
- **Revlon Duties:** Heightened duties when sale or breakup is "inevitable." Board changes from "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. (1986)*
- **Entire Fairness Standard:** If board fails at meeting standards, burden of proof shifts from plaintiffs to defendants to demonstrate how a breach of fiduciary duties did not occur. Objective evaluation of both fair dealing and fair price. *Weinberger v. UOP, Inc. (1983)*

FORM 8-K AND OFFERING FINANCIAL STATEMENTS

Significance Tests:

Reg S-X 3-05 and 1-02(w)

- Buyer's investment in Target as a percentage of Buyer's pre-closing total assets;
- Target's total assets as a percentage of Buyer's pre-closing total assets; and
- Target's continuing operations pre-tax income as a percentage of pre-closing Buyers continuing operations pre-tax income.

Acquisition vs. Disposition:

- **Acquisition:** Grace period such that due no later than 71 calendar days after the initial Form 8-K filed to report the acquisition.
- **Disposition:** Due with Form 8-K to report disposition; no grace period. Assuming no proxy statement solicitation, pro forma balance sheet and income statements required if any significance test exceeds 10%. May separately trigger ASC 205-20 discontinued operations reclassification of prior periods and reissuance of audited financial statements.

If Any Significance Test Level Is:	Audited	Unaudited	Pro Forma (Article II)
20% or less		None	
Over 20% to 40%	Target's most recent fiscal year.		Condensed balance sheet for Buyer's most recent period; and
Over 40% to 50%	Target's two most recent fiscal years.	Interim depends on Target's staleness.	Income statements for Buyer's most recent fiscal year and interim stub period.
Over 50%* <small>*for offerings, includes "probable" acquisitions as well</small>	Target annual revenue \$50m or more: three most recent fiscal years. Target annual revenue under \$50m: two most recent fiscal years.		

SEC Manual: www.sec.gov/divisions/corpin/cffinancialreportingmanual.pdf