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TAKEOVER REGIMES: A COMPARISON BETWEEN THE UK AND THE US

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A note examining the key differences in takeover law and regulation between the United Kingdom and the United States. The US regime described in the note relates to SEC reporting companies and the UK regime applies to offers for companies that are subject to the UK Takeover Code.

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SCOPE OF THIS NOTE

This note examines the key differences in takeover law and regulation between the United Kingdom and the United States. The US is a federal system so offers will be subject not just to SEC rules but also to regulation at the level of the 50 states (although many public companies are incorporated in Delaware). UK regulation is largely based on the Takeover Code (Code) which is operated by the Takeover Panel together with anti-trust rules at the UK and European level (where applicable). Litigation is very rare in UK takeover bids, whereas in the US, it can be, and sometimes is, used by disgruntled shareholders to thwart a bid. In the UK, the Panel expects the parties pro-actively to consult it throughout the bid process and in various specific situations but rarely vets takeover documents and announcements (except where a bidder chooses to give certain undertakings), whereas in the US both the prospective buyer and the target are required to file all documents and announcements with the SEC. Certain key documents filed by parties in a US-based takeover attempt, such as shareholder proxy solicitation documents, will be reviewed by the SEC and may go through multiple rounds of comments before being filed publicly.

The structure of UK offers (by which is meant, offers for UK public companies) is also different. While both jurisdictions allow for contractual offers to buy the shares in the target company, schemes of arrangement, in which there is no contractual offer to accept, are common in the UK (particularly for larger bids). In schemes, the bid is subject to a 75% by value (and majority in number) vote by target shareholders and must then be approved by the court (although it is very rare for the courts to block a takeover which has been approved by shareholders unless there are issues with the vote itself). Schemes are rarely used in hostile takeovers because they rely on the co-operation of the target company.

The US has two main avenues for the takeover of a US public company: tender offers and mergers. In a tender offer, the potential buyer publicises an offer to shareholders with certain principal terms announced, including price. Once a certain number of shareholders have tendered their shares for purchase, the offer is effective, the buyer will purchase the tendered shares, and then using its newly acquired voting power the buyer typically implements a "back-end" merger to acquire 100% of the remaining shares. A "friendly" tender offer usually also

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involves the mutual negotiation of an agreement providing for a back-end merger. In a merger not involving a tender offer, the buyer and the target will negotiate a merger agreement and, once agreed, will present the agreement to the target's shareholders for approval. Upon receiving the required threshold vote, the transaction is completed through one of the available merger structures, most commonly by merging the target with a wholly owned subsidiary of the buyer.

Another important difference lies in the UK's announcement regime which is thought to be one of the toughest in the western world. Any rumour will usually require an announcement naming all potential bidders (except where a bid has been unequivocally rejected) and bidders then have 28 days to withdraw or announce a firm bid, unless the target agrees to an extension (unless a firm offer announcement has already been made). Arguably these rules helped to frustrate Pfizer's proposed bid for AstraZeneca (see *What's Market, Pfizer Inc. possible offer for AstraZeneca PLC (withdrawn)*) and Stryker's proposed bid for Smith & Nephew. In both cases, the US bidder would not have faced such timetable pressures if they had made a bid for a target in their own jurisdiction.

There are also major differences between the tax regimes, and these can sometimes influence the motivation for a takeover (such as AbbVie's aborted bid for Shire plc; see *What's Market, AbbVie Inc. offer for Shire plc (terminated)*), but these are outside the scope of this note.

(References to rules in the UK column of the note refer to rules of the Code. The Panel has the power to waive or modify the application of the Rules. The contents of the tables represent an overview of the laws, regulations and rules that apply. In particular circumstances, different rules may apply. Legal advice should always be sought.)

AUTHORITIES RESPONSIBLE FOR TAKEOVER REGULATION

UK

- The Panel in relation to the Code.
- The Code applies to all offers for companies which have their registered offices in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market or a multilateral trading facility (such as AIM) in the UK or on any stock exchange in the Channel Islands or the Isle of Man.
- The Code also applies to offers for other public and certain private companies which have their registered offices in, and which have their place of central management and control in, the UK, the Channel Islands or the Isle of Man.
- The Code regulates takeover bids and merger transactions of relevant companies, however these are effected. There are two main types of takeover offer structure in the UK: contractual offers (whereby each shareholder decides whether to accept the offer) and court-sanctioned schemes of arrangement.
- Schemes of arrangement do not involve individual shareholder acceptances but instead require a shareholder vote (a majority in number representing 75% in value of those voting by person or proxy) and High Court approval. If those requirements are satisfied, the takeover offer becomes binding on all shareholders, even if they voted against the scheme. By contrast, in a contractual offer, shareholders who decline to accept the offer are not bound to sell their shares to the bidder unless the bidder acquires (or unconditionally contracts to acquire) 90% of the shares to which the offer relates and 90% of the voting rights in the target, in which

US/Delaware

- The Securities and Exchange Commission (SEC) through its rules regulates mergers and tender offers involving companies that are registered with the SEC; in particular, among other regulations, mergers and tender offers involving SEC-reporting companies are subject to the tender offer and proxy rules under Section 14 of the Securities Exchange Act of 1934, as amended (Exchange Act), disclosure and communications obligations under the Securities Act of 1933 (Securities Act) and the general anti-fraud provisions of the federal securities laws, including Rule 10b-5 of the Exchange Act. The Exchange Act may also apply to certain companies without registered securities. (See *Practical Law US Corporate & Securities, Practice note, Public Mergers: Overview*.)
- State corporate laws govern many aspects of takeovers, including board fiduciary duties, implementation of anti-takeover measures and transaction structuring. Therefore state courts also have an important role in governing takeover procedures, particularly in the case of contested battles. As more than 50% of all publicly-traded companies are domiciled in Delaware, the Delaware General Corporate Law (DGCL) is the most important and well-developed governing state law in relation to public takeovers. The following discussion summarises Delaware law where applicable; however, it should be noted that the laws of other states differ from Delaware in various important respects.
- The Federal Trade Commission (FTC) and the U.S. Department of Justice have the authority under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) to review transactions for competition considerations as well as to police "gun jumping"

case the bidder can compulsorily buy the dissenting minority out at the offer price (*Part 28, Companies Act 2006*).

- The Competition and Markets Authority (*Competition Act 1998, Enterprise Act 2002* and *Enterprise and Regulatory Reform Act 2013*) and sectoral regulators eg utilities (OFGEM, OFCOM, OFWAT etc), Prudential Regulation Authority and/or Financial Conduct Authority for financial services companies.
- The European Commission (EU anti-trust legislation).
- The Secretary of State for Business, Energy and Industrial Strategy in respect of mergers relating to the media sector, national security and stability of the financial system only.
- Financial Conduct Authority in respect of market abuse (*Market Abuse Regulation*; see also *Criminal Justice Act 1993 on insider trading*).
- The courts eg on appeal (rare in practice) except that the courts will always be involved in approving (or rejecting) schemes of arrangement (see above).

violations where a bidder and target prematurely commence integration or coordination of their conduct, or where a bidder prematurely acquires control of beneficial ownership of a target, in either case, in violation of the statutory waiting periods.

- Under the Exon-Florio Amendment to the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, the Committee on Foreign Investment in the United States (CFIUS), an interagency group chaired by the Treasury Department, has the authority to investigate and, where necessary, block or unwind mergers and acquisitions by foreign persons involving certain sensitive sectors that could pose national security risks. CFIUS' authority applies whenever a foreign person is acquiring control over, or in some cases, acquiring non-controlling interests in, an existing US business or, in some cases, real estate, directly or indirectly, whether or not the business or real estate is already foreign-owned.
- Corporations in certain industries, including banking, utilities, insurance, pharmaceuticals and communications may be subject to additional regulation by their industry regulator.

GENERAL PRINCIPLES OF TAKEOVER CONDUCT

UK

- Equivalent treatment of all target shareholders in the same class; protection of minority shareholders following a takeover.
- Sufficient time and information for target shareholders to reach a properly informed decision.
- Target board must not deny its shareholders the opportunity to decide on the bid.
- No false markets in target shares.
- Bidder can only announce a (firm) bid after ensuring it has certain funds (cash) and has taken all reasonable measures to secure non-cash consideration.
- Target's business must not be hindered for an unreasonably long period by a bid.

(*General Principles of the Code*.)

US/Delaware

- The general anti-fraud provisions of the federal securities laws, including Rule 10b-5 of the Exchange Act, apply to all deal structures involving the offer or sale of securities.
- "All Holders Rule" similarly requires equivalent treatment of shareholders of the class(es) of securities subject to a tender offer (see *Equal treatment of shareholders* below).
- Shareholder approval may be sought through a proxy or consent solicitation in the event the bidder seeks a merger without the use of a tender offer.
- The quantum of information and consideration time for a tender offer or a proxy or consent solicitation is governed by the Exchange Act and associated regulations.
- The bidder and its affiliates and certain other persons acting in concert with them, upon launching a tender or exchange offer, may generally not trade in the target's shares outside of the offer.
- Bidders may announce an offer without having firm financing, but must disclose its proposed sources of funding for the bid, including any alternative financing arrangements in the event primary financing plans fall through.
- No restrictions on how long an offer may remain open, although tender offers must remain open no less than 20 business days. Similarly, proxy or consent statements must be sent at least 20 business days before the meeting of shareholders, if information is incorporated by reference from existing SEC filed documents.

TARGET DIRECTORS' DUTIES

UK

Directors must:

- Act within their powers, for example, no issue of shares solely in order to frustrate a takeover offer.
- Promote the success of the company, having regard to: long-term consequences, reputation for high standards of conduct, acting fairly between shareholders and the interests of employees, creditors, customers, suppliers etc.
- Exercise independent judgement, for example, in giving a recommendation on a bid (not simply repeating shareholder views).
- Exercise reasonable care, skill and diligence.
- Avoid conflicts of interest, for example, in a MBO, the management team should not take part in board decisions on the bid (see also Notes 4 and 5 on Rule 25.2).

Not accept benefits from third parties and should declare interests in transactions or arrangements.

(*Sections 171 to 177 and 182, Companies Act 2006*.)

There is a duty to act in the interests of creditors where the company is in financial difficulties (common law, as preserved by *section 172(3), Companies Act 2006*).

The Code does not require the target board to consider price as the (sole) determining factor in deciding whether to give a recommendation (*Note 1 on Rule 25.2*).

US/Delaware

Under Delaware law, target directors have two main duties, the duty of care and the duty of loyalty:

- Duty of care. A director is obliged to act on an informed basis after due consideration of all material information reasonably available to the board and appropriate deliberation, including considering the input of legal and financial experts and, when considering a transaction, having a reasonably adequate understanding of the value and risks of not engaging in a transaction. The directors must act to assure themselves that they have the appropriate information and sufficient time required to consider whether to take, or refrain from taking, action in light of a takeover proposal. A plaintiff attempting to demonstrate that a board has failed its duty of care generally must show that the board has shown gross negligence in its decision-making.
- Duty of loyalty. Directors have a duty to act and make decisions in what they believe to be the best interests of the corporation and its shareholders. Each director must not act adversely to those interests in favour of personal interests or the interests of others. The duty of loyalty also includes the obligation of directors to act in good faith, an obligation which may be breached where a director acts (i) with a purpose other than advancing the best interests of the corporation and its shareholders; or (ii) with the intent to violate applicable law or where a director intentionally fails to act in the face of a known duty to act.

Both of these duties are subject to differing standards of review depending on the actions taken by the board and applicable circumstances.

- Business Judgment Rule. The default standard of review states that "directors' decisions are presumed to have been made on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." (*Panter v. Marshall Field & Co., F.2d 271, 293-295 (7th Cir. 1981)*.) It is a presumption that the directors are complying with their fiduciary duties and requires shareholders challenging a board decision to show that such decision cannot be attributed to any rational business purpose.
- Enhanced scrutiny. Certain decisions by a board will face a higher standard of scrutiny, including in the context of a takeover bid (i) a board's adoption of defensive mechanisms in response to a threat to corporate control or policy; (ii) a board's decision to pursue a transaction involving a sale of control or if such a transaction becomes inevitable; and (iii) a transaction involving a conflict of interest:
  - *Unocal/Unitrin*. Directors who adopt defensive measures in response to an unsolicited offer must demonstrate that (i) the board had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed"; and (ii) the defensive measure chosen was reasonable in relation to the threat posed, meaning an action that is not "coercive or preclusive" and falls within the "range of reasonableness." (*Unitrin, Inc. V. Am. Gen. Corp., 651 A.2d 1361 (Del 1995)*); and
  - *Revlon*. Transactions involving a sale of control of a corporation require directors to take efforts to achieve the highest value reasonably available for shareholders. Where a target board is considering two or more capable bidders presenting transactions that are comparable in terms of timing and likelihood of consummation, therefore, it generally must look solely to price. This standard applies only where a company enters into a transaction that will result in a change of control and not, for example, where a board refuses to engage in negotiations with an offeror, or where the transaction does not involve an actual change of control.
  - *Entire fairness*. Directors may be required to demonstrate that a decision was "entirely fair" to the corporation and its shareholders, both in terms of the process followed by the directors and the ultimate terms of the decision, in transactions involving (i) approval by the board where a majority of the directors are not disinterested and independent; or (ii) a controlling shareholder that has a material interest in both sides of the transaction or that receives different consideration from the non-controlling shareholders. Certain procedural mechanisms put in place by the board may either satisfy the fairness test or, in certain cases, support the application of the more lenient business judgment rule instead of the entire fairness test.

(For further information, see *Practical Law US Corporate & Securities, Practice notes, Fiduciary Duties of the Board of Directors* and *Fiduciary Duties in M&A Transactions*.)

THE APPROACH AND ANNOUNCEMENTS

UK

- Before an announcement, confidential information concerning the offer or possible offer must be kept secret and all parties must seek to minimise the chances of a leak (*Rule 2.1*).
- An announcement is required:
  - when a firm intention to make an offer is notified to the target board (which is a pre-requisite under Rule 1); or
  - when shares have been acquired triggering a mandatory offer under Rule 9, that is 30% - 50% of the voting rights; or
  - when, following an approach by a potential bidder, the target company is the subject of rumour and speculation or there is an untoward movement in its share price; or
  - when, after a potential bidder first actively considers an offer but before an approach has been made to the target board, the target company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential bidder's actions which have led to this occurring; or
  - when discussions relating to a potential offer are about to be extended beyond a very restricted number of people; or
  - when a purchaser is sought for an interest in shares carrying at least 30% of the voting rights or the target board is seeking one or more potential bidders and the target company is the subject of rumour and speculation or there is an untoward movement in its share price or the number of potential purchasers approached is about to be increased to include more than a very restricted number of people.

  (*Rule 2.2 and Practice statement No. 20.*)
- Any target announcement relating to possible offer(s) must identify any potential bidder from whom an approach has been received unless it was unequivocally rejected.
- Any subsequent target announcement which refers to a new potential bidder must identify that bidder (except where made after a firm offer announcement).
- Any target announcement which first identifies a potential bidder must specify the deadline for the offer to become firm or for the potential bidder to announce that it is withdrawing its interest and include a summary of the dealing rules.

  (*Rule 2.4.*)

US/Delaware

- Absent a contractual restriction, there is no requirement that a bidder keep confidential non-public information about a proposed bid. Under Rule 10b-5 of the Exchange Act, a target is required to disclose material acquisition negotiations if any of the following apply:
  - the company or its directors or officers trade in the company's securities; or
  - the company or its agents leak details of negotiations to the market; or
  - disclosure is necessary to (i) correct previous misstatements; or (ii) update previous statements that were correct when made but have become misleading over time and on which investors continue to rely.
- The target's stock exchange may require the target to confirm or deny whether it is negotiating a transaction in the event of irregular stock trading.
- Unlike in the UK, a potential bidder has the ability to choose its moment to go public with an announcement of a proposed transaction. Except in the event of a "creeping tender offer" (see *Share dealing and stakebuilding* below), or if required by the target's stock exchange as a result of unusual market activity, an announcement of a proposed transaction is generally only required when the bidder determines to make a tender offer for the company (or, in the case of a "friendly" tender offer, promptly following the signing of the merger agreement). In a "hostile" tender offer, provided that the bidder is able to maintain confidentiality surrounding the consideration of its offer, a bidder generally may make the announcement at any time it chooses.
- The commencement of a tender offer customarily occurs when the bidder:
  - publishes a summary advertisement in a national daily newspaper or mails the tender offer materials to the target company's shareholders;
  - files the tender offer materials with the SEC and pays the required filing fee;
  - delivers tender offer documents to the target; and
  - delivers a notice of commencement and copies of tender offer materials to the applicable stock exchange.
- A public merger without the use of a tender offer is generally only announced upon the reaching of a definitive agreement, by the issuance of a press release, often jointly by the parties and, if

- The Panel must be consulted in advance in relation to pre-conditions to the making of an offer or a statement on the terms of a possible offer. Only where a bidder specifically reserves the right to withdraw from such a statement in certain circumstances and those circumstances subsequently arise or in wholly exceptional circumstances can a bidder withdraw from such a statement.

  (*Rule 2.5*.)
- Once a bidder is named in any announcement, it has 28 days to either make a firm offer announcement or announce that it is withdrawing its interest (for six months, with limited exceptions), unless the Panel grants an extension to the deadline with the consent of the target board.
- This deadline does not apply where another bidder has announced a firm offer. In such circumstances, the first potential bidder is required to clarify its intentions (in the same way) by day 53 of the firm offer, that is, the 53rd day following publication of the first bidder's offer document.

  (*Rule 2.6*.)

(For further information, see *Practice note, Rule 2 of the Takeover Code: Panel Practice Statement No. 20*.)

applicable, the filing of such press release and the merger agreement with the SEC on a Form 8-K. While there is no legal requirement that parties issue a press release, the major US stock exchanges require the members to publicly disclose material information. At that point the parties will jointly draft the proxy statement on Schedule 14A seeking the target's shareholders' approval of the agreement or, in some cases, the approval of the acquirer's shareholders as well.

CONTENT OF FIRM OFFER ANNOUNCEMENT

UK

- A firm offer must only be announced after the most careful and responsible consideration and when the bidder has every reason to believe that it can and will continue to be able to implement the offer. The announcement must include confirmation from a financial adviser that sufficient resources are available to satisfy the cash element of the offer.
- The announcement must include (among other things):
  - the terms of the offer;
  - all offer conditions;
  - the bidder's intentions with regard to the target's business, employees and pension scheme(s);
  - details of any arrangements relating to the circumstances in which the bidder may invoke conditions;
  - details of interests and short positions in target shares;
  - details of any irrevocable commitments or letters of intent procured by the bidder;
  - details of any dealing arrangement;
  - a summary of any offer-related arrangement; and
  - a statement relating to the bidder's right to reduce the offer consideration by the amount of any dividend paid by the target.

(*Rule 2.7(c)*.)

US/Delaware

- The content of offer announcements is largely governed by Regulation M-A (see *Offer documents* below).

SHARE DEALING AND STAKEBUILDING

UK

- Stakebuilding is permitted provided that the bidder has no price-sensitive/inside information on the target (*Rule 4 and Article 9(5), Market Abuse Regulation (Regulation 596/2014)*) and Part V of the Criminal Justice Act 1993.
- Restrictions on the acquisition of 30% or more of voting shares subject to certain exceptions such as an acquisition from a single shareholder in a seven day period or immediately before a recommended firm intention announcement (*Rule 5*). This can also trigger a mandatory offer requirement under Rule 9.
- If a bid leaks, an announcement may be necessary.
- An offer must be on no less favourable terms than purchases made in the three months before the offer period (usually triggered by first announcement) (*Rule 6*).
- If 10% or more of the target shares of any class are acquired for cash in the 12 months before the offer period, the offer must be in cash (or a cash alternative) at not less than the highest price paid previously. If 10% or more of the target shares of any class are acquired in exchange for securities in the three months before the offer period, securities must be offered to all other target shareholders (*Rule 11*).
- Bidders, the target and anyone interested in 1% of any class of shares in the target must disclose details of interests or short positions they hold in target shares at the start of the offer period (or when the bidder is first publicly identified or in relation to a bidder when a competing securities exchange bidder is publicly identified) and any dealings during the offer period (*Rule 8*).

US/Delaware

There are no general restrictions on open market purchases prior to announcing a bid. However, there are certain disclosure and regulatory requirements a prospective bidder must be aware of:

- In the event that a bidder acquires beneficial ownership of 5% or more of any class of a target's equity securities registered with the SEC, the bidder generally is required to notify the SEC within ten days of the acquisition (*Section 13(d), Exchange Act*). Bidders of up to 20% of a target's securities who do not intend to change or influence control of the target may file more limited information. For further information, see *Practical Law US Corporate & Securities, Practice note, Filing Schedule 13D and 13G Reports*.
- All transactions by the bidder or any related persons occurring during the 60 days prior to the commencement of a tender offer must be disclosed to the SEC under its Schedule TO (*Item 1008, Regulation M-A*).
- Under Section 7A(a)(2) of the HSR Act, a purchaser must make a pre-merger notification in the event that it acquires US$94 million worth of the target's securities, which in transactions involving sizable companies may occur before the acquisition of 5% ownership. The threshold is adjusted annually based on changes to the US gross national product.
- The bidder must take care not to conduct purchases in a way that could be characterised by the SEC or the courts as a "creeping" tender offer. Although "tender offer" is not defined in the Williams Act of 1968 or in the Exchange Act, the "Wellman Test", which was defined in *Wellman v. Dickinson* (*475 F.Supp. 783, 823-24 (S.D.N.Y. 1979)*), is often used to determine whether a tender offer has been initiated. The Wellman court approved the use of eight factors suggested by the SEC to determine whether a purchase or series of purchases constitutes a "tender offer", including:
  - active and widespread solicitation of shareholders;
  - solicitation for a substantial percentage of target's stock;
  - offers at a premium to the prevailing market price;
  - fixed rather than negotiable terms of an offer;
  - the offer being contingent on a fixed minimum and/or maximum number of shares;
  - the offer being limited in time;
  - pressure being placed on offerees to sell their securities;
  - a public announcement of a purchase program preceding or accompanying a rapid accumulation of securities.

  Not all factors need to be present for the SEC or a court to determine that a series of purchases constitute a "creeping tender offer." In the event that purchases by a potential bidder could be characterised as a "tender offer", such purchases would be subject to the tender offer provisions of the Exchange Act.

OFFER TERMS AND CONDITIONS

UK

- Following a firm offer announcement, the bidder must proceed unless it is permitted to invoke one of its stated offer conditions except (with the Panel's consent) where a higher firm offer is announced (*Rule 2.7(b)*).
- Other than the acceptance condition (which must be set at a level exceeding 50% of the voting shares), offer conditions can only be invoked if the circumstances giving rise to the right to invoke the condition are of material significance to the bidder and cannot be subjective. Financing conditions are not permitted (*Rule 13*).
- Where applicable, the offer must lapse if there is a phase 2 competition reference (*Rule 12*).
- If the offer includes cash, the bidder's financial adviser must confirm that resources are available to satisfy the offer in full (*Rules 2.7(d) and 24.8*).

US/Delaware

- Tender offers are subject to certain requirements, including:
  - a minimum offer period of 20 business days, with certain mandatory extensions in the event the bidder changes certain offering terms or other material developments;
  - withdrawal rights for shareholders at any time before the offer's expiration and any time after 60 days from the offer's original commencement, if the tendered shares have not been purchased; and
  - no purchases of the target's securities may be made by the bidder or its affiliates (which generally include directors and executive officers) or certain other covered persons after the announcement of the offer until its expiry, except as part of the offer or pursuant to specified exceptions.
- Exchange offers are subject to the same requirements as cash tender offers, and the bidder must additionally file a registration statement with the SEC providing information on the bidder, the offer and securities to be issued to shareholders; the offer must remain open until the SEC declares the registration statement effective.
- There is no legal requirement for a bidder to have committed funding prior to announcing an offer, although the proposed sources and amount of funds, as well as any material conditions attached to funding sources, must be publicly disclosed in its offer to purchase (see *Offer documents* below) and, depending on the timing of such disclosure, the offer may need to be extended under SEC rules.
- Upon acceptance of a tender or exchange offer, the bidder must promptly purchase the tendered shares, subject to the satisfaction of the offer conditions, which customarily include minimum tender requirements, the absence of any event having a material adverse effect on the target, and the receipt of all regulatory approvals.

BID AGREEMENTS BETWEEN BIDDER AND TARGET COMPANY

UK

No restrictions or undertakings relating to a takeover may be imposed on a target company (or its concert parties) by a bidder, even if the target agrees, during an offer period or when an offer is reasonably in contemplation except:

- Confidentiality.
- Non-solicitation of employees, customers or suppliers (but covenants not to solicit other bids and rights to match new bids are prohibited).
- Commitments to provide information in relation to an official or regulatory approval.
- Irrevocable commitments and letters of intent (but these must be restricted to an agreement by a shareholder to accept or support the offer in relation to its shares: *Practice Statement No. 29*).
- Agreements relating to an existing employee incentive scheme and pension funding.

Undertakings and commitments which restrict the bidder (other than in a reverse takeover) are permitted *(Rule 21.2)*.

US/Delaware

- Even after entering into a merger agreement, a target company's board has a fiduciary duty to accept a superior offer. Merger agreements, however, may include a variety of protections for an existing buyer to prevent the target from soliciting or accepting other offers:
- No-shop provisions. Typically, once a bidder and a target sign a merger agreement, the target must immediately stop soliciting competing bids. On the other hand, if a board of directors receives an unsolicited superior proposal, and would be violating its fiduciary duties by not engaging with the third party, the board would have the right to provide information to, and engage with, the third party.
- Matching rights. Typically an initial bidder will have the right to be informed of ongoing negotiations with a competing bidder, and prior to the exercise of the target's termination rights must be informed of, and given the opportunity to match, the superior aspects of the competing proposal.
- Break-up fees. In the event that the initial bidder is outbid and the target terminates the agreement to accept a higher offer or, under certain other conditions, the target may be required to pay a break-up fee to the bidder. In some instances, the bidder is required to pay the target a "reverse" break-up fee, for example if it is unable to obtain financing or regulatory approval for the transaction. (For further information, see *Practical Law US Corporate & Securities, Practice note, Break-up or Termination Fees*.)
- Go-shop provisions. In the event that a target believes certain aspects of the bidder's proposal are insufficient or that the fulfilment of the target board's fiduciary duties otherwise call for it, bidders may be willing to offer a "go-shop", whereby the parties will sign the merger agreement but the target will be allowed a specified amount of time to solicit superior proposals, with decreased deal protections for the initial bidder.

EQUAL TREATMENT OF SHAREHOLDERS

UK

- Comparable offers are required for each class of equity share capital (*Rule 14*).
- Appropriate proposals must be made to holders of convertibles, warrants and share options (*Rule 15*).
- Prohibition on making favourable offers to some, but not other, shareholders. Management incentivisation arrangements (where management hold target shares) are subject to a fair and reasonable opinion from the target's independent financial adviser and, where significant or unusual, must be approved by target shareholders at a general meeting (*Rule 16*).
- A bidder must offer shareholders the highest price paid in the previous 3/12 months (see *Share dealing and stakebuilding* above).

US/Delaware

- All holders' rule. The consideration paid to any shareholder for securities tendered in a tender or exchange offer must be the highest consideration paid to any shareholder for securities tendered in such offer, and all shareholders must have an equal right to elect the type of consideration from among those offered (*Rule 14d-10, Exchange Act*).
- Shareholders that do not vote in favour of a merger agreement may have the right to demand an appraisal of the fair value of their shares and shall have the right to receive a higher value if it is determined that the consideration paid by the purchaser is lower than the value determined by a court. For more information on when appraisal may be available, see *Practical Law US Corporate & Securities, Practice note, Appraisal Rights*.

TIMETABLE

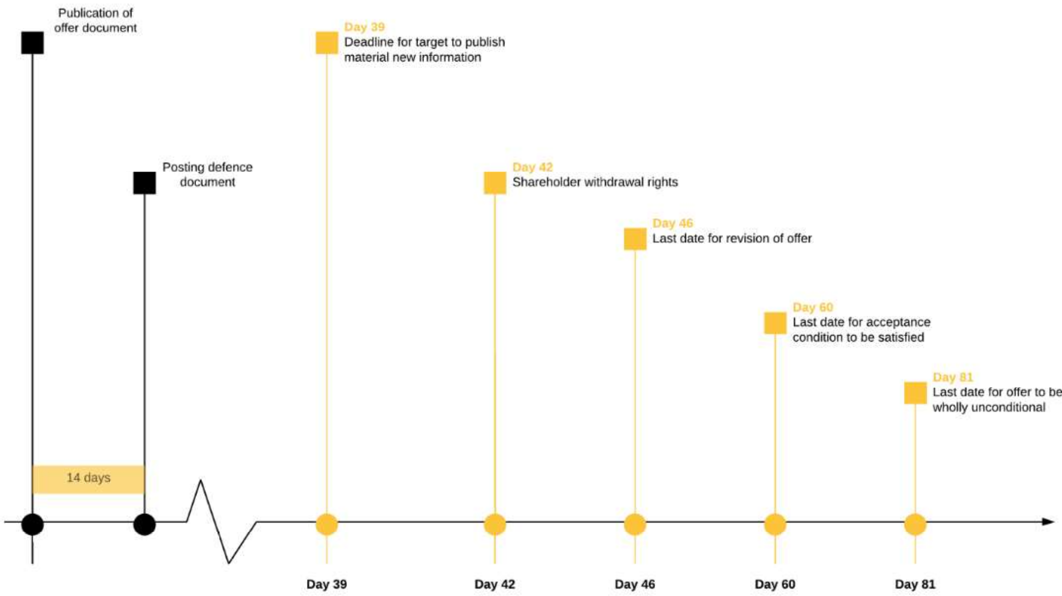
UK

The timetable below does not apply to schemes of arrangement where timing depends partly on court dates. The shareholder meetings must normally be held at least 21 days after the date of the scheme circular (*section 3(d), Appendix 7, Code*).

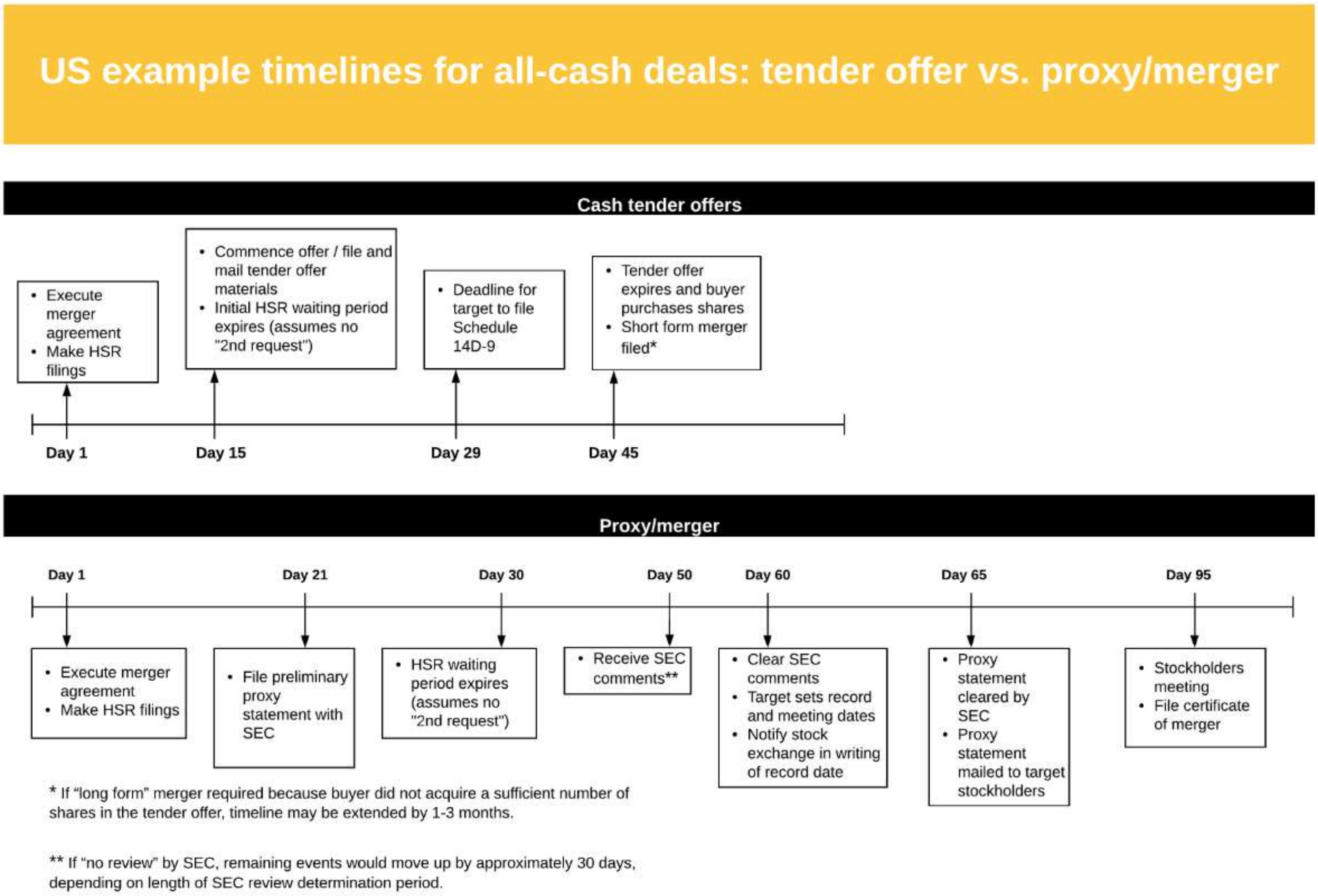
US/Delaware

There is no specified timetable for the consummation of a transaction in the US. However, based upon certain legal waiting periods, general minimum timelines for a cash-only offer (as opposed to a securities-only offer or cash and securities offer) are set out below. Both of these timelines assume a friendly deal after a definitive merger agreement has been executed; a hostile deal can take significantly longer. Both of these timelines also assume that no other regulatory approvals necessary to consummate the merger require longer time periods than those required by SEC rules and, if applicable, its review process. For more information on minimum timelines for transactions involving securities-only consideration or cash and securities consideration, both of which would involve the filing of a registration statement, see *Practical Law US Corporate & Securities, Practice note, Public Merger Timeline (Stock Consideration)*.

UK timetable - contractual offer



US example timelines



CONDUCT DURING THE OFFER

UK

- Documents, announcements and statements made must satisfy the highest standards of care and accuracy and information must be adequately and fairly presented (*Rule 19.1*).
- Statements that an offer may be improved must be avoided (*Rule 19.3*).
- Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision. Information must be made available early enough to enable them to make a decision in good time. No relevant information should be withheld from them (*Rule 23.1*).
- Information should be provided to all shareholders at the same time and in the same manner.
- Any information given to one bidder must, on request, be given equally and promptly to all competing bidders (*Rule 21.3*). This requirement will usually only apply where the bidder has been informed authoritatively of the existence of another potential bidder (or a public announcement has been made of a bidder to whom information has been given).
- The target board may not take frustrating action when it has reason to believe an offer may be imminent or during the course of an offer, unless it obtains shareholder approval in general meeting (*Rule 21.1*).

US/Delaware

- In the period following the signing of the merger agreement, including for takeovers accomplished with or without the use of a tender offer, certain communications from the bidder or the target to shareholders and employees must contain applicable required legends and be filed with the SEC on the date of communication, with appropriate SEC cover pages, among other requirements.
- As specified in *Offer documents* below, all communications to shareholders made after the filing of a Schedule TO by the bidder are required to be filed on the date of communication as an amendment to the previously-filed Schedule TO (if by the bidder) or to the Schedule 14D-9 (if by the target).
- Disclosures made in any such filings are subject to the same standards of reporting under the Exchange Act as any filings made with the SEC, and must not be false or misleading.
- Following the announcement of the proposed transaction, both parties are required to disclose all "material" facts through their filings. Whether a fact is material was defined by the Supreme Court as "if there is a substantial likelihood that a reasonable shareholder would consider [the fact] important in deciding how to vote" or, in the context of a tender offer, deciding whether to tender their shares to the bidder (*TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)*).
- Stock markets may impose their own disclosure obligations on parties involved in a tender offer or merger situation. For instance, the New York Stock Exchange and NASDAQ require listed companies to address rumours which result in unusual market activity, even if it would require the parties to make an announcement regarding an offer prior to when the bidder intended.
- The offer must be extended by at least ten business days in the event of any change in the tender offer consideration or in the percentage of securities sought (other than increases of 2% or less in the percentage sought).
- In the event of other changes to a tender offer, the offer must also be extended for certain specified periods depending on the nature of the materiality or significance of the changes.
- In the event that the offer becomes oversubscribed, the bidder must acquire shares from all tendering shareholders on a pro rata basis.

POISON PILLS BEFORE OFFER IMMINENT

UK

- The legal position will depend on the circumstances but directors need to justify any such action in the context of their duties to exercise their powers for a proper purpose and to promote the success of the company (as opposed to its management). Institutional shareholders often oppose them in practice and they are rare.

US/Delaware

- Defensive measures are judged under the *Unocal/Unitrin* standard (see *Target directors' duties* above). This includes the situation where a threat is not known by the board to exist.

OFFER DOCUMENTS

UK

Rules 24 and 25 of the Code impose detailed rules as to the content of the offer and defence documents, including disclosure of:

- The target board's opinion on the offer and substance of advice by its independent financial adviser.
- Financial information.
- Offer financing.
- Terms and conditions.
- Material contracts outside ordinary course in the two years prior to start of offer period.
- Any profit forecasts.
- Details of the bidder's interests in target shares and dealings since 12 months before the start of the offer.
- Advisers' fees.
- An opinion from employee representatives/defined benefit pension trustees on the offer if provided in time (*Rule 25.9*).
- The bidder's intentions with regard to its strategic plans for the target, the target's management, employees, redeployment of fixed assets, employer contributions into target's pension scheme and existing share trading facilities (*Rule 24.2*).

US/Delaware

A "one-step" merger without the use of a tender offer primarily involves the preparation of a proxy statement on Schedule 14A seeking the target shareholders' approval of the agreement or, in some cases, the approval of the acquirer's shareholders as well. Schedule 14A (including other disclosure rules cross-referenced in Schedule 14A, such as Regulation S-K and Regulation M-A) governs the disclosure requirements for the proxy statement.

- The proxy statement discloses, among other things:
  - a description of the transaction;
  - the identity and background of the parties and their previous dealings;
  - the reasons for the transaction and the board's recommendation;
  - information from the financial advisor (e.g. a fairness opinion);
  - appraisal/dissenter's rights; and
  - tax disclosures.

A tender or exchange offer, whether hostile or recommended, involves the following documents:

- A Schedule TO, filed by the bidder with the SEC incorporating information by reference to an offer to purchase, which is described below. Both documents are governed by the disclosure requirements of Regulation M-A.
- An offer to purchase, prepared by the bidder, which states the terms of the transaction and is required to disclose, among other things:
  - the identity and background of the parties;
  - previous dealings between the parties;
  - the bidder's plans or proposals concerning the target;
  - the sources and amounts of the bidder's funds and a description of any financing arrangements; and
  - audited financial statements of the bidder, unless the bidder's financial condition is not material to the target's shareholders.
- A letter of transmittal providing instructions on how to tender shares.
- A Schedule 14D-9, prepared by the target and filed with the SEC and setting out the target board's position in relation to the offer.

See also *Conduct during the offer* above regarding the filing requirements for communications with the target's shareholders relating to the offer.