

Final Examination
Mergers & Acquisitions
Jeffrey Karlin
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1. You have three (3) hours to complete this exam.
2. This is an open book exam.
3. This exam consists of one (1) part.

There are four (4) essay questions. You must choose to write your response to any three (3) of the four (4) questions presented below. Please be sure to clearly designate the three (3) questions you choose to answer. Please do not answer more than three (3) questions since you will only receive credit for the first three responses presented in the order presented in your blue book.

There is no time limit on a particular question. All of the questions are equivalent in point score—namely, each of the three (3) questions which you choose to provide your analysis is valued at thirty-three and one-third (33 1/3) points on a one hundred (100) point scale.

Please write your response in the blue books provided. Please write clearly. Write on every other line and every other page to permit instructor comments.

4. Write your exam number on your exam envelope. Put your correct class section and student exam # at the top of this page, each page of questions, and each blue book. **Do not** use your name, student ID number or Social Security Number on any exam materials.
5. At the conclusion of the exam, return all test materials, including blue books, scratch paper, and this exam packet to the envelope and submit it to the proctor. **DO NOT** seal the envelope. Students who do not return all exam materials at the end of the exam may not be graded.

GOOD LUCK!

Essay Questions

Use these facts for all four questions

As of Monday, April 23, 2007 Alexander, Inc. (“Acquirer” or “A”) and Thomas Corporation (“Target” or “T”) are two calendar year, publicly traded corporations. Acquirer shares are comprised of one class of outstanding publicly traded common stock. Target issued two classes of stock but only one class of stock is listed and traded on a public exchange. In essence outstanding T shares include one class of publicly traded common stock and one class of privately held preferred stock. Acquirer is a Delaware corporation and Target is a California corporation. Both A and T are engaged in business in all states in various countries. Acquirer is engaged in separate lines of business that are generally not competitive with or similar to the businesses engaged in by Target. However, Acquirer and Target do compete in one line of business where each possesses a 15% market share. This common business is not significant in contributing to either corporation’s overall profit.

On April 23, 2007 the Chief Executive Officer (CEO) of Acquirer and Target met informally in a New York City hotel to discuss the possible merger of Target into Acquirer. The Target board of directors was aware of the meeting and had informally approved the Target CEO entering into preliminary discussions with Acquirer subject to further discussion and Target board review. After the meeting the Target CEO felt that the Acquirer’s preliminary offers were sufficient to bring the matter before the Target board. Consequently, later that week the Target CEO and Target Chief Financial Officer (CFO) presented a summary of the key points discussed as regards the Acquirer’s initial deal offer and rationale for a Target merger into Acquirer. After the board meeting the Target board instructed the CEO to continue preliminary conversations with Acquirer representatives. In addition, the board authorized the CEO to engage your law firm, Morris and Andrews, a California Limited Liability Partnership (“M&A”) to assist in negotiating, structuring and drafting a non-binding letter of intent subject to further board review and approval.

You are an associate attorney in the corporate and securities division of the law firm. Among other things, M&A provides corporate counsel to Target and recently assisted the Target in “going public” in its initial public offering (“IPO”) completed on December 31, 2006. You were an active member of the legal team assembled to assist the Target in consummating its IPO. In the public registration statement (which included the IPO prospectus) there is a detailed description of the common stock issued in the public offering as well as the privately held preferred stock that was not issued but held by senior inside officers of the Target and certain providers of venture capital.

1. STATE LAW ACQUISITION CONSIDERATIONS

Although the IPO (referred to in the common facts above) was a “terrific learning experience” for Target Board members and senior officers they have no experience in the matters of mergers and acquisitions law. In that regard your supervisor in the law firm, Mary Smith, a senior partner has asked you to prepare a short and reasonably concise memorandum. Ms. Smith would like to use the memo to begin her legal analysis prior to commencing work with the CEO negotiating and drafting a Letter of Intent. Specifically she has asked that you address the general steps required under state law that Target must take in order to merge into Acquirer. For this purposes assume that an eventual plan of merger will include a provision whereby Target shareholders will exchange their shares of common stock for shares of Acquirer stock. Among other issues she has asked that the memorandum describe some of the matters that she, as a law partner may wish to consider in providing preliminary advice to the CEO and Target board. For example, she’d like to know—

Whether it is likely that both preferred and common shareholders of Target must be solicited to vote on the merger. And, if so, when is it generally advisable to conduct such a vote:

- prior to execution (signing) of the Letter of Intent of Merger between Target and Acquirer?
- after execution of a Letter of Intent and prior to execution of a definitive Merger Agreement?
- after execution of the Merger Agreement and prior to closing?

How does one determine the relative voting rights of the preferred vis a vis the common shareholders? For example, are the preferred shareholders going to be given special voting rights in the merger or do they get to vote on the same basis as the common? Where should she look? Do the common facts answer these questions and, if not where would you likely find the answers?

What happens if a requisite vote of Target shareholders is obtained approving the merger but a minority of shareholders vote against it? Are the minority shareholders nonetheless going to be required to exchange their stock for Acquirer stock?

What document, if any is presented to shareholders (assuming a vote of Target shareholders is required) and what state law requirements concerning disclosure apply?

2. PRELIMINARY MERGER CONSIDERATIONS INCLUDING LETTERS OF INTENT, APPROPRIATE REPRESENTATIVES AND DUE DILIGENCE

Assume the Target and Acquirer have determined to commence discussions intended to culminate in an initial non-binding letter of intent to merge (LOI).

- Discuss the provisions that you would contemplate the LOI to contain. Feel free to provide a list of such items but please mention why such items are important.
 - Consider and discuss separately the types of provisions falling into contractual categories such as representations and warranties, covenants, conditions precedent and termination clauses.
- Discuss why a LOI may be useful or necessary to a merger transaction.
- How is a LOI different from a definitive merger agreement?
- Discuss the experts that one would anticipate to be involved in the merger considerations on behalf of the Target and the roles that such persons would be reasonably expected to play as representatives of the Target.
- Discuss ways of protecting the Target's confidential information in light of the Acquirer's need to examine such information to assess valuation of the Target and to perform "due diligence."
- When and in what manner should a merger be publicly announced?
- Describe the meaning of "due diligence."

3. BOARD FIDUCIARY DUTIES, FIDUCIARY-OUTS, TERMINATIONS, NO-SHOPS AND DEAL ABANDONMENT

Assume a Letter of Intent of Merger (“LOI”) is approved by the boards of the Target and Acquirer. Assume that the Target shareholders have approved the merger. Further assume a definitive Merger Agreement is entered into by Target and Acquirer. The Merger Agreement provides that upon merger of Target into Acquirer Target common shareholders will receive approximately two shares of Acquirer stock for every one share of Target common stock. The Merger Agreement also provides that Target preferred shareholders will receive approximately three shares of Acquirer stock for every one share of Target preferred stock. Some of the preferred Target shareholders serve on the Target board and are senior officers of the Target.

The Merger Agreement also provides for additional provisions for purposes of your consideration. First, the agreement provides that in consideration for the vote of Target board members in favor of the merger each member of the Target board will receive a one-time cash payment of \$300,000. Second, the agreement provides for a “fiduciary-out clause” in favor of the Target. Third, the agreement provides that, if for any reason the Target determines to terminate the merger it must pay \$1 Billion dollars to Acquirer. Last, both the LOI and Merger Agreement provide for a “no shop” clause restricting the Target’s ability to solicit other possible merger candidates.

- Discuss generally the fiduciary duties that Target board members and senior management must abide by in considering approval of the merger. As a target board, what considerations must it take into account in making a favorable recommendation to shareholders?
 - Does the fact that Target preferred shareholders receive three Acquirer shares of stock (versus two for Target common) mean that Target board members holding shares of Target preferred have violated a fiduciary duty to Target common shareholders? Discuss.
 - Is the receipt of the one-time cash award of \$300,000 a breach of the recipient board member’s fiduciary duty?
- What is a “fiduciary-out” clause and why would a Target board of directors demand that such a provision be included in the Merger Agreement?
- Is entering into a \$1 Billion termination clause by definition a breach of the board’s fiduciary duty to shareholders?
- Why would Acquirer demand a “no-shop” clause? Is there a potential benefit to Target in agreeing to a “no-shop” provision?
- What if, after favorable Target shareholder vote approving the merger and execution of the Merger Agreement, a third party corporation, unsolicited by Target makes an offer of merger substantially more valuable to Target shareholders than the one agreed to in the existing Acquirer-Target Merger Agreement? Must the Target board consider the new offer? May the Target board abandon the merger under state law if it determines the new offer must be considered despite execution of the Merger Agreement and favorable Target shareholder vote? Discuss.

4. HOSTILE TAKEOVER METHODS AND SHARK REPELLANTS

Assume Target determines that the offer by Acquirer is not feasible. The Target board determines that it will not proceed to a merger under any circumstances. Discuss the following:

- Taking the view of the Acquirer, write a memo to the board of directors of the Acquirer describing the following two methods of acquiring control of the Target in a hostile manner:
 - Tender Offer,
 - Proxy Battle.
 - Contrast these two methods of control acquisition.
 - What is a “free rider” in the context of a tender offer? How, if at all, can the Acquirer deal effectively with free rider concerns?

- Taking the view of the Target, write a brief memo to the board of directors of the Target describing methods by which Target may endeavor to resist a hostile takeover by tender offer or proxy battle. Among other items, you may wish to discuss the use of white knights, antitrust laws, voting restrictions, poison pill plans, etc. to serve as hurdles to hostile acquisition.

END OF EXAMINATION