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Drafting and Negotiating Financing Provisions in Mergers

For both sides in a public company merger to come together, the merger agreement must be carefully drafted to avoid the risk of a financing failure, which can have severe consequences for both the buyer and the target company. Counsel must understand how commonly used financing provisions in the merger agreement can mitigate the risk of a financing failure, as well as how the commitment letter and the merger agreement are connected.

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Buyers routinely finance some or all of the costs to acquire a target company with committed financing. In these mergers, it is common for buyers to execute binding commitment letters with debt financing parties and, in the case of private equity sponsors, equity financing parties in connection with the execution of the merger agreement. The merger agreement typically also includes representations, covenants, and other provisions relating to the commitment letters and the financing.

The financing provisions contained in the merger agreement are critical to the target company from a deal certainty perspective. Without these provisions, the target company has less certainty that the buyer will have the necessary funds available to close the transaction. A failed transaction often has detrimental consequences for a target company. For example, the target company may incur significant out-of-pocket expenses and lose customers or employees due to the uncertainty of its sale, making an alternative transaction with another buyer either impossible or possible only at a lower price.

A buyer also is concerned about deal certainty because it faces potential liability, as well as reputational risk, resulting from a financing failure. Nonetheless, financing failures happen, so the parties to a merger seek to allocate the risk through financing provisions in the merger agreement.

Prior to the economic crisis of 2007–2008, when a number of prominent deals failed to close due to financing failures, buyers (especially financial buyers) were able to negotiate a financing out condition that allowed the buyer to terminate the merger agreement at no cost in the event of a financing failure. However, in recent years, buyers have typically been unable to negotiate a pure financing out condition that allocates all of the risk of a financing failure to the target company (as opposed to a financing condition that is tied to the remedy of a payment by the buyer of a reverse break-up fee in the event of a financing failure). (The negotiation and drafting of reverse break-up fees and other remedy provisions for financing failures are outside of the scope of this article. For information on financing remedies, search Reverse Break-Up Fees and Specific Performance and Drafting and Negotiating Reverse Break-Up Fee and Specific Performance Provisions on Practical Law.)

Currently, buyers, at the target's request, often expressly acknowledge the absence of a financing out condition and instead negotiate several representations, covenants, and other provisions that allocate the risk of a financing failure between the parties. This article examines the interrelation between the commitment letter and the merger agreement, and provides an overview of the types of non-remedy related financing provisions included in merger agreements for acquisitions with committed financing. This article also provides strategies and identifies drafting issues for buyers and target companies to consider in the drafting and negotiation of these provisions. In particular, this article addresses:

- Commitment letters for acquisition financings.
- The buyer financing representation relating to the financing commitment.
- The buyer solvency representation about post-financing solvency.
- The buyer financing covenant regarding efforts to complete the financing.
- The target company cooperation covenant to assist the buyer in completing the financing.
- The provision that delays the merger closing date to account for the marketing period under the commitment letter.
- The covenant regarding repayment of existing target company debt.
- Provisions that limit the financing parties' liability.

Search Drafting and Negotiating Financing Provisions in Mergers for the complete, online version of this resource, including initial considerations and questions counsel should ask in drafting and negotiating financing provisions in merger agreements.

COMMITMENT LETTERS FOR ACQUISITION FINANCINGS

The negotiation of the financing commitment for a merger takes place at the same time as the merger negotiation. Typically, while the buyer and the target company negotiate the merger agreement, the buyer negotiates one or more commitment letters with the financing parties (commitment letter). At the same time, the financing parties conduct due diligence on the target company. The buyer and the financing parties then execute the binding commitment letter in connection with the execution of the merger agreement.

The commitment letter specifies:

- The maximum amount of funds committed.
- The type of financing.
- The general terms of the financing.
- The conditions to funding, including the completion of the acquisition in accordance with the terms of the merger agreement.

During the negotiation of the commitment letter, among other things, the buyer and the target company should:

- Confirm that the amount of funds committed is sufficient.
- Review the conditions in the commitment letter carefully.
- Consider whether to obtain a bridge commitment.
- Address any limited guaranty from an equity sponsor.

SUFFICIENCY OF FUNDS

When reviewing the commitment letter, the buyer and the target company should confirm that the amount committed is sufficient to fund all amounts payable to complete the merger, including:

- The merger consideration.
- Any amounts needed to repay target company or buyer debt.
- Payments for equity incentives.
- Equity compensation (commonly referred to as "golden parachute" payments).
- The related fees and expenses.

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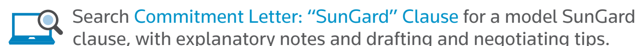
CONDITIONS AND SUNGARD CLAUSE

The buyer and the target company should carefully review the conditions in the commitment letter and confirm that they are reasonable, customary, and as limited as possible. For example, the representations required to be true at funding should be limited to:

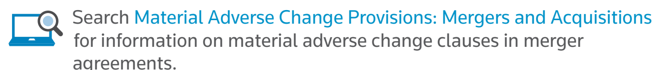
- Material target company representations in the merger agreement that, if breached, could permit the buyer to terminate the merger agreement.
- Certain fundamental representations of the buyer in its financing documents.

The language used in commitment letters to reflect these limited funding conditions in lieu of traditional conditions precedent for funding is commonly referred to as a "SunGard" clause. The SunGard clause was adopted in response to the removal of the buyer's financing out condition in merger agreements, which would have excused the buyer from completing the acquisition if financing were not available. The purpose of the SunGard clause is to reduce the number and scope of conditions precedent to funding the financing commitment so the target company has more certainty that the financing will be available and the merger will close.



Search Commitment Letter: "SunGard" Clause for a model SunGard clause, with explanatory notes and drafting and negotiating tips.

Funding is often also conditioned on there being no material adverse change in the target company. The definition of material adverse change should be consistent with the definition in the merger agreement to avoid a condition failing in the commitment letter but not the merger agreement.



Search Material Adverse Change Provisions: Mergers and Acquisitions for information on material adverse change clauses in merger agreements.

Search Commitment Letter: Company Material Adverse Change Clause for a model company material adverse change clause for a commitment letter, with explanatory notes and drafting and negotiating tips.

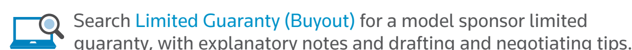
The buyer and the target company should also confirm that the financing parties have completed their diligence to eliminate any diligence condition in the commitment letter.

BRIDGE COMMITMENTS

Once the commitment letter and the merger agreement are signed, the buyer aims to coordinate the funding of the financing with the closing of the acquisition. However, if the buyer intends to raise funds through capital markets transactions, such as a high yield bond offering or, less frequently, an equity offering, the buyer may obtain a bridge commitment that will be used only if the buyer cannot complete the capital markets transaction before closing. With a bridge commitment, the buyer has the flexibility to launch an offering when market conditions are favorable and the timing otherwise works for the buyer. If the buyer completes the capital markets transaction before the acquisition closes, the bridge commitment can be terminated or reduced depending on the funds raised in the capital markets transaction.

SPONSOR LIMITED GUARANTY

When a financial buyer obtains a commitment letter from an equity sponsor, the equity sponsor typically provides a limited guaranty for the benefit of the target company to guarantee the buyer's payment of the reverse break-up fee under the merger agreement (or, in the case of a fully equity-financed transaction, sometimes the entire financing commitment amount). If the parties have agreed that the sponsor will provide this guaranty to the target company, the target company should ensure that the merger agreement includes a representation from the buyer that it has obtained the limited guaranty and that the guaranty is in full force and effect and constitutes the legal, valid, and binding obligation of the sponsor subject to customary bankruptcy and other enforceability exceptions.



Search Limited Guaranty (Buyout) for a model sponsor limited guaranty, with explanatory notes and drafting and negotiating tips.

BUYER FINANCING REPRESENTATION

If the buyer has obtained a commitment letter to finance the acquisition, the merger agreement usually includes a detailed representation relating to the financing commitment in which the buyer represents that:

- It has delivered to the target company a true and complete copy of the commitment letter, including sometimes a redacted fee letter (see below *Fee Letters*).
- The commitment letter is enforceable and in full force and effect.

When a financial buyer obtains a commitment letter from an equity sponsor, the equity sponsor typically provides a limited guaranty for the benefit of the target company to guarantee the buyer's payment of the reverse break-up fee under the merger agreement.

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- There are no side letters or other agreements relating to the financing.
- No event has occurred that with or without notice, lapse of time, or both, would constitute a default or breach by the buyer under the commitment letter.
- It does not have a reasonable basis to believe it will be unable to satisfy on a timely basis the terms or conditions of the commitment letter.
- It has paid all fees payable to date under the commitment letter.
- There are no conditions precedent related to the funding other than those expressly set out in the commitment letter.
- The aggregate proceeds from the financing, together with cash on hand of the buyer and the target company, will be sufficient to pay all of the buyer's obligations under the merger agreement (see below *Sufficiency of Proceeds*).

These representations are generally not controversial and do not vary significantly, regardless of whether the buyer is a financial or strategic buyer.

The buyer's representation relating to the financing commitment is important to the target company from a deal certainty standpoint. Factors that are important to the target company from a deal certainty perspective include:

- The identity of the financing parties, so that the target company can confirm their reputation and financial capabilities.
- The total financing amount committed.
- The funding conditions.
- The absence of side letters or funding conditions that are not set out in the commitment letter.
- The buyer's lack of awareness of any facts that make funding less likely to occur.

From the buyer's perspective, a buyer must exercise caution not to represent at signing that it currently has sufficient funds if it is relying on funding under a commitment letter.

FEE LETTERS

Some financing representations for debt financing commitments call for the delivery by the buyer to the target company of a redacted fee letter in addition to the commitment letter. The fee letter contains the core economics of the debt financing commitment, as well as the market flex terms, which permit the financing parties to modify the pricing terms to a limited extent if necessary to help syndication of the debt financing. The fee letter as delivered to the target company is redacted to remove the fees, pricing terms, pricing caps, and market flex terms. However, the target company may request that the buyer represent that the redactions do not permit reducing the financing to an amount that would be insufficient to complete the merger or that would be expected to delay or prevent the funding or make it less likely to occur.

SUFFICIENCY OF PROCEEDS

The financing representation typically states that the proceeds from the financing will be sufficient to cover the merger consideration, as well as any other amounts needed to complete the merger. The parties should consider several factors in evaluating whether the financing amount is sufficient, including:

- The merger consideration (and tender offer consideration in a two-step merger).
- The consideration payable to holders of options, restricted stock, and other equity incentives.
- Any golden parachute payments.
- The expenses of the buyer and the target company, including fees payable in connection with the buyer's financing and investment banking fees.
- Amounts needed to repay target company debt or buyer debt that will be repaid or refinanced in connection with the transaction.

Sometimes a buyer may insist that the representation regarding sufficiency of proceeds be subject to one or more specified conditions, such as:

- Assuming the debt financing is funded in accordance with the terms in the financing commitment.
- Assuming the satisfaction of the buyer's closing conditions in the merger agreement.
- Assuming the accuracy of the target company's representations in the merger agreement.
- Assuming the compliance by the target company with the cooperation covenant and all of its obligations under the merger agreement.

A target company should scrutinize these conditions because they can significantly limit the strength of the buyer's representation and sometimes provide the buyer with an incentive to argue that the financing failed because of a target company breach. The buyer, on the other hand, may insist on one or more conditions because its access to the committed funds is limited by the conditions in the commitment letter. Recent financial buyer merger agreements have included one or more conditions to the representation regarding sufficiency of proceeds, while these conditions were somewhat less common in strategic merger agreements.

BUYER SOLVENCY REPRESENTATION

The buyer may make a representation regarding the solvency of the buyer and the surviving corporation, taken as a whole, after giving effect to the completion of the merger and the transactions contemplated by the merger agreement (including the payoff or refinancing of target company or buyer debt). Sometimes the solvency representation covers only the surviving company and its subsidiaries.

The representation is often qualified by one or more assumptions, including the:

- Accuracy of the target company's representations in the merger agreement.
- Solvency of the target company and its subsidiaries immediately prior to the closing.
- Satisfaction or waiver of the closing conditions in the merger agreement.

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- Preparation of the target company projections in good faith and on reasonable assumptions.

This representation parallels the solvency representation required by the financing parties in the commitment letter.

This is one area, however, where the representations may differ depending on the type of buyer. Usually the solvency representation is less complicated for a financial buyer because the buyer typically is a newly formed entity, unlike a strategic acquisition in which the buyer may have significant existing debt and other obligations. However, in the case of a strategic merger involving a buyer that has a much larger market capitalization than the target company, the target company may not require the buyer to give a solvency representation at all. Approximately one-half of recent merger agreements with a strategic buyer included a solvency representation.

BUYER FINANCING COVENANT

Merger agreements that include a representation regarding a financing commitment typically contain a financing covenant that details the actions the buyer must take to complete the financing, as well as the standard of effort applicable to these actions. The form of the financing covenant varies, but often obligates the buyer to:

- Obtain the financing contemplated in the commitment, including requirements to maintain the commitment in effect, negotiate definitive documents, and to cause all conditions to the financing to be satisfied.
- Cause the funding under the commitment letter if the funding conditions in the commitment letter are met (see below *Requirement to Cause Funding and Enforce Financing Commitment*).
- Not amend or terminate the commitment letter if it would:
  - reduce the amount of financing (but see below *Considerations with a Bridge Commitment*); or
  - impose new or additional conditions to the financing in a manner that could prevent or delay the completion of the merger or make the funding less likely to occur.
- Notify the target company promptly of the status of the financing efforts and more specifically of any breach or default under the financing commitment or definitive financing agreements.
- Use certain efforts (see below *Financing Efforts Standards*) to obtain alternative debt financing if the anticipated debt financing is no longer available.
- Acknowledge that there is no financing condition to the merger.

A strategic buyer with negotiating leverage or strong creditworthiness may resist a detailed financing covenant or even any financing covenant at all. However, the target company often wants to make sure that the buyer is taking customary actions to ensure that the funds will be available at closing. A detailed financing covenant enables a target company to pursue a claim for breach before the outside date if the buyer is not pursuing the financing.

When a buyer has both a debt commitment and an equity commitment, the merger agreement may include separate covenants for each type of commitment. The covenant relating to the equity commitment may be simple and not qualified by any efforts standard. The covenant relating to the debt commitment usually is more detailed and subject to an efforts standard. Separating the covenants can benefit the target company because the target company can negotiate the specific terms of the covenants depending on the type of commitment.

FINANCING EFFORTS STANDARDS

In recent merger agreements, almost all debt financing covenants that are qualified by an efforts standard subject the buyer to a reasonable best efforts standard. Occasionally, debt financing covenants are qualified by a best or commercially reasonable efforts standard. Equity financing covenants, on the other hand, sometimes are not qualified by any efforts standard, especially if the buyer has obtained a definitive agreement for the equity financing at the time of execution of the merger agreement.

REQUIREMENT TO CAUSE FUNDING AND ENFORCE FINANCING COMMITMENT

Financing covenants often expressly require the buyer to use certain efforts to both:

- Cause the funding contemplated under the financing commitment if the conditions to the commitment letter have been satisfied.
- Enforce its rights under the commitment.

In a small minority of recent merger agreements, the covenant expressly requires the buyer to commence litigation. Other agreements expressly provide that the reasonable best efforts standard does not include a requirement to commence litigation.

The target company should push for strong enforcement language but should also consider how this covenant interplays with the remedies provisions in the merger agreement in the event of a financing failure, including the payment by the buyer of a reverse break-up fee in connection with a termination of the agreement for a financing failure and the ability of the target company to seek specific performance. The buyer should consider the potential impact of this covenant on its relationship with its financing parties and is likely to strongly resist any requirement to commence litigation against its financing parties.

Search Reverse Break-Up Fees and Specific Performance: A Survey of Remedies in Leveraged Public Deals (2018 Edition) for more on buyer financing covenants.

CONSIDERATIONS WITH A BRIDGE COMMITMENT

If the buyer has a bridge commitment and expects to replace the committed financing with permanent financing before the completion of the merger, the financing covenant should permit the buyer to reduce or terminate the financing commitment to the extent it obtains permanent financing or otherwise has the funds necessary to close.

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TARGET COMPANY COOPERATION COVENANT

A key item for a buyer is negotiating a detailed cooperation covenant that describes what the target company must do to assist the buyer in completing a committed debt financing (cooperation covenants are not common for sponsor-backed equity commitments because the sponsor is an affiliate of the buyer). The covenant typically requires the target company to use certain efforts (see below *Cooperation Efforts Standard*) to provide cooperation, as reasonably requested by the buyer and as is customary for the contemplated debt financing, at the buyer's expense, in connection with obtaining the debt financing.

The cooperation covenant is often subject to intense negotiation because the buyer seeks to ensure it obtains all information needed to market and complete the financing, while the target company seeks to minimize the amount of work it must do, as well as the risk that the buyer will assert a breach of the cooperation covenant as the basis for a financing failure.

The cooperation covenant often covers many specific items, including the target company's obligation to:

- Deliver specified historical financial statements and other information required for the buyer to prepare pro forma financial statements (see below *Required Information and Financial Statements*).
- Assist with the preparation of marketing materials for the financing, including bank information memoranda, prospectuses, or offering memoranda, and road show, lender, or credit rating agency presentations.
- Cause the target company's senior management to be reasonably available for investor and lender meetings, diligence meetings, road shows, and meeting with ratings agencies.
- Provide information to help the pledging of collateral.
- Assist with the preparation of definitive financing documentation.
- Take necessary corporate actions (subject to the closing) to assist the buyer in completing the financing.
- Provide the information required under applicable know-your-customer and anti-money laundering rules and regulations.
- Arrange for customary payoff letters for the target company's debt that will be repaid at closing.
- Consent to the use of the target company's logos in connection with the financing.

If the type of financing is known, the cooperation covenant can be further tailored to the information required for the particular type of financing.

The cooperation covenant is critical to the buyer. The buyer needs information, including financial information, as well as the cooperation of the target company's senior management, to complete the debt financing because the target company's assets often are part of the credit support for the financing. Therefore, the buyer negotiates for as broad a cooperation covenant as possible.

A key item is what financial statements, including pro forma financial statements, the financing parties will require to complete the financing. If the target company is a public company and the buyer is acquiring the entire target company, this is not generally an issue, except that the target company may need to update its publicly disclosed pro forma financial statements for recent significant acquisitions and dispositions (see below *Required Information and Financial Statements*). However, if the target company is a private company or the buyer is buying only a portion of the target company, obtaining historical financial statements may require extra time.

The target company, on the other hand, wants to ensure that it will be able to comply on a timely basis because if the financing becomes uncertain, the buyer may argue that the financing failed because the target company breached the cooperation covenant. The target company also wants to avoid any obligation to take actions that could result in the target company incurring a liability before the closing. For example, while it is common for the cooperation covenant to require the target company to execute documentation relating to the financing, the covenant should note that no signatures are effective until the closing.

In addition to setting expectations regarding the target company's efforts and delivery of information, cooperation covenants often:

The cooperation covenant is critical to the buyer because the buyer needs information, including financial information, as well as the cooperation of the target company's senior management, to complete the debt financing because the target company's assets often are part of the credit support for the financing.

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- Limit the target company's cooperation obligations.
- Require the buyer to:
  - reimburse and indemnify the target company for its cooperation; and
  - maintain the confidentiality of the target company's information.

COOPERATION EFFORTS STANDARD

Similar to financing covenants, almost all cooperation covenants for debt committed financing in recent merger agreements have a reasonable best efforts standard. The efforts standard used for the target company's cooperation covenant usually matches the efforts standard in the buyer's financing covenant. The target company, however, does not typically covenant to cooperate with an equity financing.

REQUIRED INFORMATION AND FINANCIAL STATEMENTS

Cooperation covenants require the target company to deliver "required information" to the buyer to complete the financing. A typical definition of required information obligates the target company to deliver:

- The historical financial statements specified in the commitment letter.
- The information necessary for the buyer to prepare the pro forma financial statements specified in the commitment letter.
- Any additional financial, business, or other information reasonably requested by the buyer or the financing parties to complete the financing and customarily required for the type of financing.

The buyer and the financing parties negotiate the specific financial statements to be delivered as a condition to funding under the commitment letter. If the buyer plans to pursue a registered public securities offering, the commitment letter typically requires the buyer to deliver the financial statements that must be filed under the applicable form of registration statement, including the financial statements required under Regulation S-X and Regulation S-K. Rule 3-05 of Regulation S-X specifies the historical financial statements that are required for a probable or completed acquisition depending on the results of the significance test. Pro forma financial information that complies with Article 11 of Regulation S-X must also be included when an acquisition triggers the need for the filing of any acquired business financial statements under Rule 3-05. (17 C.F.R. §§ 210.3-05, 210.11.)

Search Acquisition Financing and Securities Offerings: Financials, Diligence, and Disclosure, Regulation S-X Disclosure Requirements for Financing Acquisitions: Chart, and Financial Statement and Pro Forma Disclosure Requirements Flowchart for more on required information and financial statements.

However, for materiality purposes, the financing parties may require that the offering document include target company historical or pro forma financial statements, or both, even if they are not technically required by the Securities and Exchange Commission (SEC) rules. For a private placement under Rule 144A, the financing parties may offer some flexibility regarding the required financing statements. If the target company has recently completed any significant acquisitions or dispositions, the target company may need to update its pro forma financial statements relating to those transactions for the financing. Although the buyer typically prepares the pro forma financial statements, it needs information from the target company to prepare them.

The cooperation covenant often provides that the target company is not required to deliver information required under Rule 3-10 or 3-16 of Regulation S-X (relating to financial statements for guarantors of securities and certain affiliates of the issuer if their securities are pledged as collateral for a registered offering) or executive compensation information required under Item 402(b) of Regulation S-K (17 C.F.R. §§ 210.3-10, 210.3-16, 229.402(b)).

The target company seeks to define the required information as narrowly as possible to limit the amount of work it must do and shift as much of the burden as possible to the buyer. A narrow definition references only the historical financial statements of the target company as prepared on a timely basis for SEC filings.

The buyer, on the other hand, argues for a more expansive definition that covers all information needed to market and complete one or more types of financings, especially if the buyer is not certain of the type of financing. The buyer wants flexibility to request information that the financing parties consider material to the investors. The buyer also wants the covenant to require the target company's cooperation with obtaining any required auditor consents for the filing of the target company's financial statements.

The cooperation covenant should require the target company to provide historical financial statements for periods that end after the signing of the merger agreement and before the closing so that the buyer has the financial statements required on a going forward basis.

LIMITS TO COOPERATION COVENANT

Most cooperation covenants include express limitations on the target company's obligations to cooperate, including no requirement to:

- Cooperate if the cooperation would:
  - unreasonably interfere with the target company's operations; or
  - conflict with the target company's organizational documents or contracts.
- Incur expenses that will not be reimbursed by the buyer.
- Take actions that could cause its directors, officers, or stockholders to incur personal liability.

One item that is negotiated is whether the target company must provide legal opinions for the financing. A small minority of recent merger agreements required the target company to provide legal opinions, while most expressly provide that the target company is not required to provide legal opinions. A middle ground approach requires the target company to cooperate with the buyer's legal counsel in delivering legal opinions for the financing.

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REIMBURSEMENT AND INDEMNITY

In almost all cooperation covenants, the buyer is required to reimburse the target company for all expenses incurred in fulfilling its obligations under the cooperation covenant, and to indemnify the target company and its related parties for any liabilities arising from its cooperation activities.

CONFIDENTIALITY

Many cooperation covenants require the buyer to maintain the confidentiality of all target company information provided to the buyer in connection with the financing. Absent this provision, a separate confidentiality agreement executed in connection with the merger may cover the information.

Search Confidentiality Agreements: Mergers and Acquisitions for more on confidentiality agreements.

DELAY OF CLOSING FOR MARKETING PERIOD

Commitments for syndicated debt financings customarily condition funding on the expiration of a marketing period (often two to four weeks) during which the financing parties syndicate (or de-risk) the financing. Under the commitment letter, the marketing period will not start until the buyer has provided the financing parties with all required information for the marketing, which at a minimum includes the required financial statements, but may also include the syndication or marketing materials for the financing. One concern for a buyer is having the obligation to close under the merger agreement at a time when the financing parties are not required to fund.

To address this concern, a buyer can request the delay of the closing date under the merger agreement until the marketing period has expired to avoid triggering the obligation to complete the acquisition under the merger agreement before the financing parties are obligated to fund under the commitment letter. While most financial buyers successfully negotiated a marketing period delay in public merger agreements in 2018, the provision is far less common in strategic merger agreements.

In particular, the marketing period provision should address:

- The time period by which to extend the closing date.
- The circumstances that trigger the commencement of the marketing period.
- The need for required information to be compliant during the marketing period.
- Common features, such as blackout dates and completion, tolling, or restart of the marketing period.

TIME PERIOD

The marketing period extension of the closing date in the merger agreement is typically as long as (or a few days longer than) the marketing time period specified in the commitment letter. The time period ranges from 12 to 20 consecutive business days, with 15 consecutive business days being the most common in recent merger agreements.

COMMENCEMENT OF THE MARKETING PERIOD

The marketing period definition generally provides that the marketing period commences when all required information has been delivered. The required information is deemed to have been delivered if the target company delivers a notice to the buyer of the target company's belief that all required information has been delivered and the buyer does not object within a specified number of business days. Sometimes, even when the required information has been delivered, the merger agreement provides that the marketing period starts when all conditions to the merger agreement have been satisfied (other than those conditions that by their nature cannot be satisfied until the closing). Other merger agreements provide that the marketing period will not start if there exists any condition or event that could cause the conditions not to be met at closing or that gives the buyer the right to terminate the merger agreement.

COMPLIANT INFORMATION

If the buyer anticipates using the capital markets for its acquisition financing, the required information generally is also required to be "compliant" during the entire marketing period. Most definitions of compliant include a Rule 10b-5 standard that the information does not contain any untrue statement of a material fact or omit to state any material fact necessary to make the required information not materially misleading. Other provisions in a compliant definition include the following requirements:

- **Securities law compliance.** The financial statements comply with the requirements of Regulations S-K and S-X excluding certain provisions, such as the affiliate and guarantor financials required by Rules 3-10 and 3-16 of Regulation S-X.
- **Sufficiency of financial statements.** The financial statements are sufficient for the auditors to deliver a customary comfort letter, including customary negative assurance that nothing came to that auditor's attention that caused it to believe that the financial statements fail to meet a specified standard (for more information, search Comfort Letters: Purpose and Process on Practical Law).
- **No withdrawal of audit opinion.** The auditor has not withdrawn its audit opinion.
- **No restatement of financial statements.** The target company has not publicly announced a restatement of its financial statements or an intention to do so.

COMMON FEATURES OF A MARKETING PERIOD PROVISION

A marketing period provision commonly addresses:

- **Blackout dates.** The provision specifies blackout dates that will not count towards the marketing period (typically around Independence Day, mid-August to Labor Day, Thanksgiving, and mid-December until early January).
- **Completion of the marketing period.** The provision states that the marketing period will be deemed to be completed when the financing has been completed.
- **Tolling or restart of the marketing period.** The provision provides for tolling or restart of the marketing period if the

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target company's auditor withdraws its audit opinion or the target company publicly announces that it must restate its financial statements.

A target company may argue that a strategic buyer, especially one that historically has had reasonable access to capital, should not be entitled to delay the closing for a significant period of time after the parties are otherwise ready to close. If the definition of required information needed to start the marketing period involves onerous delivery obligations, the target company may also argue that the delay provision gives the buyer too much control over the timing of the closing by increasing the odds that the buyer will claim that the target company has not delivered all required information. The buyer, on the other hand, will argue that it should not be obligated to close before the financing parties are obligated to fund. The buyer should also consider whether it could be liable for a reverse break-up fee in the event of a financing failure that occurs because the marketing period under the commitment letter has not expired.

In lieu of a marketing period delay, the merger agreement could include a different delay mechanism, such as a provision that the closing cannot occur before a specified day or that the buyer has the option to delay the closing one time for a specified number of days.

DEBT REPAYMENT COVENANT

A buyer often repays or refinances existing target company debt when the acquisition closes because the closing accelerates the debt or results in a default under the debt documents or, in the case of high yield bonds, triggers a put right for the noteholders (often in combination with a credit ratings decrease). As a result, the buyer insists that the merger agreement obligate the target company to take the steps necessary to pay off this debt, including obtaining the requisite payoff letters from lenders or making a tender offer to noteholders. A target company, on the other hand, requests that the buyer fund the repayment. The parties should ensure that these provisions work mechanically with the provisions of existing debt agreements.

FINANCING PARTIES LIMITATION OF LIABILITY PROVISIONS

Beginning in 2009, so-called "Xerox" provisions began appearing in merger agreements. The term refers collectively to provisions that benefit debt financing parties by limiting their liability in an acquisition financing, including provisions that provide for:

- **No recourse to the financing parties.** The target company has no recourse against the financing parties and cannot pursue litigation against the financing parties directly. (However, the target company may negotiate for the buyer to agree to pursue litigation against the financing parties in the event of a financing failure. See above *Requirement to Cause Funding and Enforce Financing Commitment*.)
- **A sole and exclusive remedy.** The payment of a reverse break-up fee, if included in the merger agreement, is the target company's sole and exclusive remedy against the financing parties.
- **Governing law and venue.** The financing parties have the benefit of special governing law and venue provisions (typically New York), even if the merger agreement is governed by another state's law.
- **Waiver of a jury trial.** The target company waives any right to a jury trial in litigation with the financing parties.
- **Third-party beneficiary status.** The financing parties are third-party beneficiaries to the Xerox provisions to permit the financing parties to enforce their rights under the merger agreement.
- **A prohibition on amendment without the financing parties' consent.** The Xerox provisions may not be amended without the consent of the financing parties to protect their rights.

Almost all merger agreements with acquisition debt financing provisions include Xerox provisions. The substance of these provisions is relatively standard. Before signing the merger agreement, the buyer should confirm that the financing parties are satisfied with the Xerox provisions.

Search Drafting and Negotiating Reverse Break-Up Fee and Specific Performance Provisions for more on Xerox provisions.

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