agement where appropriate, including integrating ESG metrics into performance measures, performance goals, and vesting conditions. A number of factors have led to the increased use of ESG metrics in incentive compensation plans. These include stakeholder activism (as discussed above) and the repeal of the performance-based exception to Section 162(m) of the tax code. The change to Section 162(m) provides companies with greater latitude to include qualitative (or subjective) performance metrics in their incentive compensation programs.

Shearman & Sterling's soon to be released 18th annual survey of the Top 100 U.S. Companies (based on revenue and market cap) reveals that 36% of surveyed companies incorporate ESG metrics into their executive compensation program. Approximately 80% of these companies include these metrics in their annual, as opposed to long-term, incentive plans. This reflects the long-held view that long-term plans should focus on financial and stock-return metrics, as opposed to operational metrics. For all but two of the companies, diversity was included among the ESG metrics, while energy companies also typically included environmental and safety metrics.

ESG metrics are typically factored into a holistic qualitative review of individual performance, which typically constitutes between 15% and 30% of the total bonus opportunity. Approximately 20% of surveyed companies set forth a specific weighting related to ESG, usually about 10%. These qualitative measures should be included among the performance measures used on performance evaluations and scorecards, many of which already include governance issues. A common design question for companies incorporating ESG metrics is whether to measure success against internal targets, or targets set by third parties, such as SASB.

Conclusion

The ESG landscape is evolving rapidly. While it is still too early to know what impact "stakeholder capitalism" will ultimately have on corporate decision making, it is clear that ESG factors now represent important risk and value components in M&A transactions. Until there is greater transparency of ESG reporting and more unified measurement frameworks, M&A practitioners should take particular care in understanding and addressing ESG risk in transactions and companies should ensure that the existing ESG framework is well integrated into their M&A strategy and execution.

ENDNOTES:

[1]The IFC Performance Standards are available on the IFC website at https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards.

A DEALMAKER'S GUIDE TO THE FINAL DOJ/FTC VERTICAL MERGER GUIDELINES

By Craig Waldman and Michael A. Gleason

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The U.S. Department of Justice ("DOJ") and a divided Federal Trade Commission ("FTC") released the final version of their Vertical Merger Guidelines in late June, the first revision in more than 35 years. The Guidelines outline the type of competitive harm that can result from vertical transactions and describe how the agencies will evaluate them. For the most part, and consistent with our experience, the final Guidelines reflect how the agencies analyze the relatively small number of transactions that raise vertical antitrust issues. Among other things, the Guidelines acknowledge that "vertical mergers often benefit consumers" but caution that such transactions "are not invariably innocuous." Nonetheless, their release and the inclusion of concepts discussed below contribute to the recent agency focus on vertical merger enforcement.

What Are the Guidelines and Do They Matter?

The Guidelines outline the principal economic and legal analysis that the DOJ and FTC apply to their review of certain "non-horizontal" M&A transactions. The U.S. antitrust agencies first issued merger guidelines in 1968 related to their review of transactions involving competitors (the "Horizontal Merger Guidelines"). The Horizontal Merger Guidelines, updated several times since, have long served as a guidepost not only for the antitrust agencies, but also for courts, private practitioners, and business to evaluate and analyze the risk of anticompetitive harm following the combination of competing businesses. The DOJ last released merger guidelines for non-horizontal transactions in 1984 and thus they have long needed a refresh, a fact that agency leadership has acknowledged.[1]

Although vertical mergers comprised about 5% of agency merger enforcement over the last 25 years,[2] they have received increased attention in recent years. In 2017, the DOJ unsuccessfully attempted to block AT&T's acquisition of Time Warner, Inc., and senior DOJ and FTC officials have identified vertical mergers as an enforcement priority. For example, in a September 2019 speech, FTC Chairman Joseph Simons cautioned that "anticompetitive vertical mergers are not unicorns, and there should not be a presumption that all vertical mergers are benign."[3] Chairman Simons further cautioned that anticompetitive vertical mergers "may not arise every day" but "are common enough that we need to pay careful attention to look for and challenge them."

The Guidelines—despite being just that, guidelines and not definitive legal boundaries—matter because they reflect ***current*** agency practice. As such, and despite the fact that they will never answer every question, they should serve as a much-improved roadmap for practitioners and companies to understand which non-horizontal transactions are likely to cause antitrust risk.

What Types of Transactions Do the Guidelines Cover?

The main focus of the Guidelines is "vertical" mergers. Vertical mergers combine two or more companies operating at different levels of the *same* supply chain. A classic supply chain includes an input (or raw materials) supplier, manufacturer, distributor, and retailer. A vertical merger would involve, for example, a manufacturer of Bluetooth chips that merges with a manufacturer of wireless headphones. The stage of the supply chain closer to the ultimate consumer is "downstream" while the stage furthest from the consumer is "upstream." In the preceding example, the Bluetooth chip manufacturer is upstream while the headphone manufacturer is downstream.

While the draft Guidelines released for public comment in January covered only vertical mergers,[4] the final Guidelines also include complementary and diagonal transactions. Products are ***complements*** if they are not inputs to each other, their demand rises and falls together, and a price increase of one product decreases the demand for the other product. For example, if the price of electric-car batteries increases, car manufacturers might purchase fewer electric motors too. ***Diagonal*** mergers combine an input supplier and a downstream rival of the input supplier that does not use the input; for example, a manufacturer of gasoline-powered cars acquires a manufacturer of electric-car batteries. The inclusion of complement and diagonal theories could have wide ranging consequences, but the impact depends on the willingness of the agencies to depart from their historical enforcement restraint in these areas.

Which Vertical Mergers Are Likely to Be Found Anticompetitive?

Although the Guidelines do not offer bright-line rules to distinguish anticompetitive and procompetitive (or at least competitively benign) vertical mergers, they summarize the types of harm that the agencies consider when making enforcement decisions: foreclosure, raising rivals' costs, access to competitively sensitive information, and increased risk of marketplace coordination.

- ***Foreclosure*** occurs if a vertically-merged company refuses to supply an input to competitors in a downstream market, those competitors cannot find alternative suppliers, and, as a result, there is less downstream competition. For example, a manufacturer of wireless headphones that acquires the only manufacturer of Bluetooth chips might have the incentive and ability to stop supplying Bluetooth chips to competing headphone manufacturers. Competitors of the headphone division may struggle to compete without Bluetooth chips.

- Even if the merged Bluetooth/headphone company continues to sell Bluetooth chips, it may have the incentive to ***raise rivals' costs*** by selling chips at a higher price or decreasing the quality of products or services sold to headphone competitors.

- Without proper controls in place, the merged Bluetooth/headphone company might use ***competitively-sensitive information*** received from Bluetooth sales to headphone competitors to advantage its headphone division.

- A vertical merger might increase the likelihood of industry ***coordination*** because a vertically-merged company has information about its rivals' products and sales or because it eliminates or reduces competition from a maverick company that benefits consumers.

Do the Guidelines Identify Any Other Ways that a Vertical Merger Can Harm Competition?

Yes. While we described the main theories of harm above, the Guidelines include a number of other hypotheticals that are "flavors" of those theories.[5]

- ***Two-Level Entry.*** According to the Guidelines, a vertical merger could harm competition if it makes entry less likely by forcing potential entrants to enter both upstream and downstream markets to succeed. The

Guidelines describe the example of a sole supplier ("A") of an off-patent pharmaceutical ingredient that merges with the sole downstream manufacturer ("B"). In the example, a new downstream manufacturer ("C") was poised to enter, supplied by A. The Guidelines state that the merger could make C's entry more costly and riskier if it also has to enter the upstream business because the merged company no longer has an incentive to sponsor C's entry.

- ***Customer Foreclosure.*** The merged company may have the incentive and ability to cut off access to the downstream market such that competitors of the merged company's upstream division would no longer find it profitable to continue to supply an input. There are, however, very few examples of agency enforcement actions that allege a customer foreclosure theory of harm. Using the example of the Bluetooth chip/headphone merger above, if the merged company self-supplies 100% of its Bluetooth chip requirements, Bluetooth rivals might exit the market if there are few other outlets for their products. In turn, if Bluetooth rivals exit, the upstream division could increase the price of chips sold to rival headphone manufacturers, and ultimately consumers.

- ***Raising Rivals' Costs of Distribution.*** The Guidelines state that a merger between a manufacturer and distributor could harm competition if the merged company has the incentive and ability to raise resale prices for rival brands even though the competing manufacturers may respond to the merged company's incentives by setting lower, not higher, wholesale prices. In the Guidelines' example, the distributor has a "strong position" in a region based on "superior support and developing close customer relationships," and customers consider other distributors to be "inadequate substitutes for the merged firm's distribution."

- ***Complements.*** As noted above, products are complements if they are not inputs to each other, their demand rises and falls together, and a price increase of one product decreases the demand for the other product. The agencies may investigate whether a merged company can disadvantage rivals by increasing the price or decreasing the quality of a complementary product to customers that do not buy both.

- ***Diagonal Mergers.*** Also as described above, diagonal mergers combine an input supplier and a downstream rival of the input supplier that does not use the input; for example, a manufacturer of gasoline-powered cars acquires a manufacturer of electric-car batteries. The agencies may investigate whether the transaction reduces competition if the acquired technology (batteries) is incompatible with the buyer's products (cars), and redesigning the buyer's products to incorporate the technology would neither lower costs nor improve quality.

So Bottom Line: Which Market Factors Should I Be On the Lookout For?

Picking up on our hypothetical merger of Bluetooth chip and wireless headphone manufacturers, the following are important although none is dispositive:[6]

- The downstream market for wireless headphone manufacturing, the upstream market for Bluetooth chip manufacturing, or both have very few credible competitors.
- The merged Bluetooth/headphone manufacturer will have a high share in the upstream Bluetooth market, the downstream headphone market, or both. High share typically means more than 50%.[7]
- The benefits from foreclosure (and gained sales in headphones) outweigh lost sales in another product (Bluetooth chips), which will naturally depend on product margins, among other facts.
- The merging Bluetooth chip manufacturer is a critical supplier to the headphone manufacturer's competitors, or the merging headphone manufacturer is a critical buyer of Bluetooth chips from its upstream division's competitors, either of whom are likely to complain to the agency.
- It would be costly or time consuming for competing headphone manufacturers to substitute away from the merged company's Bluetooth chips, or for competing Bluetooth chip manufacturers to find alternative outlets for their products.
- There are few competing headphone manufacturers and after the merger, the merged company is not likely to sell Bluetooth chips to a new entrant.
- Bluetooth chips and headphones are homogenous products for which there are few competitors, prices and output are transparent, and/or the upstream Bluetooth division supplies competing headphone manufacturers, and/or the downstream headphone division buys from competing Bluetooth suppliers.
- The company has foreclosed competition or raised its rivals' costs after past vertical mergers in similar markets.
- The premium wireless headphone company acquires the Bluetooth chip manufacturer, whose products are used only in low-end wireless headphones. Incorporation of the Bluetooth chips into low-end headphones has intensified competition with premium headphones, and the acquisition would neither expand nor improve the functionality of the acquiring company's headphones.
- The Bluetooth chip manufacturer has high share, acquires a company that sells complementary software for optimizing headphone connectivity and audio, and has the incentive and ability to raise the price of the software to headphone manufacturers that do not buy both products.

How Do You Defend a Vertical Merger?

As we noted at the outset, most vertical mergers are procompetitive, and as you would therefore expect, they make up a small proportion of DOJ and FTC enforcement actions. And even the agency guidelines acknowledge that "vertical mergers often benefit consumers." However, when the DOJ or FTC do investigate your deal, demonstrating that the merged company will have neither the ability nor the incentive to foreclose rivals or raise their costs will continue to be key to a successful defense. Evaluating the net effect of potential harms and benefits can involve a deep dive into company documents and data and economic modeling.

Competitive markets for the upstream product can mean that rivals will be able to step in and take customers if the merged company chooses to cut off its competitors. If the merged company's own demand for the input represents a small portion of that company's sales of the input, then the merged company will lack incentives to foreclose because it will stand to lose more revenue by cutting back supply than it could hope to make up through increased sales of the downstream product. Demonstrating that the merged company's economic incentives will be to continue to sell products to its competitors, and that it stands to lose by cutting off rivals or increasing prices, also might be key to a successful defense.

The Guidelines also outline how vertical mergers can be procompetitive, for example by: streamlining production, inventory management, and distribution; facilitating creation of new products; and resulting in cost savings. In addition, there is much economic literature recognizing that vertical mergers can lead to procompetitive benefits in the form of greater efficiency and cost savings to the merged companies that can benefit consumers, a fact the DOJ acknowledged in its challenge to the AT&T/Time Warner combination. Parties to a deal where an investigation is likely should study and document these benefits in their strategic plans.

Elimination of "double marginalization" ("EDM") plays a prominent role in the Guidelines and should be a central part of most vertical merger defense strategies. Double marginalization refers to the margins that each company in a supply chain earns when making a sale. A vertical merger can lower the merged company's costs if it self-supplies the input, eliminating the margin that the formerly independent supplier charged before the deal. It is important to remember that both DOJ and FTC have staff economists that make recommendations to agency leaders, independent of the legal staff recommendation, about whether to recommend a challenge to a merger. In vertical mergers, the economic analysis, and in particular the EDM analysis, plays an outsized role in the agencies' final challenge decision.

If your deal has multiple global antitrust filings, it is also important to develop a comprehensive strategy to ensure that you are not making inconsistent arguments to the various antitrust agencies. Each agency will conduct its own investigation, but they coordinate on evidence, arguments, and remedies. Antitrust authorities outside the U.S., including in Europe and China, have been more likely to investigate and seek a remedy in vertical mergers compared to their U.S. counterparts.[8]

Do the Guidelines Address Remedies in Vertical Mergers?

No.[9] Remedies in non-horizontal transactions can either be "structural," typically meaning a divestiture of some kind, or "behavioral," meaning requiring the merged company to take certain actions or refrain from conduct.[10] Both the DOJ and FTC have a "strong preference" for structural divestitures to cure anticompetitive harm in mergers.[11] Absent unique circumstances, neither the DOJ nor FTC in the current administration are likely to consider seriously a standalone behavioral remedy.[12] On average, about 85% of all FTC settlements involve structural relief, but just 4% of FTC settlements involved vertical mergers.[13] The FTC's 2017 remedy study reported that all four of its vertical merger settlements in the study period (2006-2012) involved behavioral rather than structural relief.

Although both DOJ and FTC say they strongly prefer structural remedies—even in vertical cases—both agencies have said they will consider tailored behavioral remedies to cure vertical mergers in very limited cases.[14] For example, DOJ will consider a behavioral settlement when a vertical transaction generates substantial efficiencies that cannot be achieved without the merger (or through divestiture), and if the remedy will "completely cure" the anticompetitive harm.[15] For example, a firewall between a vertically-merged company and the information its upstream or downstream division receives from rivals that are customers or suppliers should, in many cases, cure the risk of improper information sharing and/or coordinated effects.

Practical Dealmaking Suggestions

Risk Allocation: Leave Adequate Time in the Transaction Agreement

Few vertical mergers merit long antitrust reviews. Although averages suggest that vertical merger reviews last longer than horizontal merger reviews, there is probably not enough data to conclude that is really the case. Factors that contribute to the length of vertical merger reviews include the complexity of the economic data and analysis, the fact that vertical mergers necessarily involve at least two markets, and, in global deals, parallel reviews by foreign antitrust agencies.

Moreover, in vertical mergers that necessitate a settlement, you can expect the DOJ or FTC to spend more time vetting any remedy if it is not a structural divestiture.[16] The agencies will take extra time to craft settlement language and vet the remedy with potentially aggrieved customers, competitors, or suppliers, to ensure that the remedy cures the harm and does not include any loopholes.

Risk Allocation: Efforts to Complete the Deal

The fact is that the agencies investigate and challenge very few vertical deals. The Guidelines do not materially alter the risk analysis for most deals. Those that are challenged tend to involve shares that exceed 50% or obvious information sharing risk. And while the agencies have become more stingy with behavioral remedies, they remain a viable alternative to solving limited competition concerns in certain vertical deals.

Sellers want deal certainty and therefore want the buyer to commit to any and all structural or behavioral remedies necessary to obtain agency clearances. While a buyer might be willing to commit to certain remedies, it will not want to agree to any remedy that materially impacts the strategic or financial value of the deal. For example, there may not be a viable structural remedy if the target sells just a single product, multiple products are produced in a single facility via a single business unit, or if distinct products are difficult, if not impossible, to disentangle in a reasonable time period (*e.g.*, some software). Perhaps more important, a structural divestiture is likely to eliminate the very benefits of vertical integration—*e.g.*, streamlined production, improved distribution, network optimization, product integration—that motivated the deal in the first instance.

To protect the value of the deal, buyers sometimes agree to prescribed or capped remedies, for example, limited to or excluding certain assets or products, or capped by revenue, EBITDA, profits, synergy value, or a less precise measure such as a material adverse effect or a burdensome condition. When the buyer and seller cannot reach agreement on the remedy obligation, they sometimes resolve the issue through a reverse termination fee in which the buyer pays the seller a fee if the deal does not close for antitrust (or sometimes other) reasons.

Spend Time Carefully Thinking Through Remedies for the Transaction Agreement

In the event your vertical deal meets the "high standard" for a behavioral remedy,[17] it is worth thinking through what behavioral commitments, if any, the company might be willing to make to resolve an investigation. Some behavioral remedies such as firewalls may be low burden and unlikely to affect the company's bottom line or deal economics. However, other remedies such as access requirements, cooperation obligations, forced arbitration, or long-term supply agreements may be less palatable from a business perspective.

Consider Preempting Concerns

The easiest vertical issue for the agencies to spot and for the parties to cure is the risk of improper information flow. You should consider preemptive adoption of firewalls or other restrictions related to competitor information if the merged company's upstream or downstream division sells to or buys from competitors. You may be able to shorten or avoid all together a protracted investigation or remedy if you can show the company has seriously considered and implemented proper safeguards. Competing suppliers or customers that deal with the upstream or downstream division might demand it anyhow, and it may help you avert a complaint to the agency.

Merging parties also should consider how to resolve the concerns, if any, of complaining customers or competitors (in vertical deals, they might be one and the same) to avert an agency challenge. Depending on the complaint, examples include extending existing contracts or prices, agreeing to long-term supply, guaranteeing access to certain products or technology, or setting minimum quality standards, among other things. Although the agencies are skeptical of private agreements, they can be effective because the DOJ and the FTC rarely litigate a merger case without witnesses (usually customers or competitors) to testify about competitive harm that could occur in the marketplace.[18] Of course, the business will need to weigh the impact of a private agreement on the deal value, as well as the fact that it may unfairly advantage the competition.

ENDNOTES:

[1]*See e.g.*, Concurring Statement of Christine S. Wilson, Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment, at 1 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

[2]Comments of the American Bar Association Antitrust Law Section on the U.S. Antitrust Agencies' Draft Vertical Merger Guidelines, at 3 (Feb. 22, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-22420-ftc-doj.pdf.

[3]FTC Chairman Joseph Simons, Fordham Speech on Hearings Output (Sept. 13, 2019), https:// www.ftc.gov/system/files/documents/public_statements/1544082/simons_-_fordham_speech_on_hearings_output_9-13-19.pdf.

[4]*See* Craig Waldman, Pam Taylor, Michael Gleason, Jeremy Morrison, and Laura Malament, "What You Need To Know About the New FTC/DOJ Vertical Merger Guidelines," *The M&A Lawyer*, February 2020, Vol. 24, Issue 2.

[5]The Guidelines incorporate by reference to the Horizontal Merger Guidelines the "potential competition" theory of harm. Under this theory, a merger could harm competition by eliminating a company that was poised to enter its business (or a nascent rival). Although the theory of harm applies to a loss of competition between competitors, the Guidelines state that the agencies will consider whether the upstream or downstream company could use its preexisting operations in the industry to facilitate its entry.

[6]Of course, even these examples might not suggest a merger is likely to face competitive concerns.

[7]Although there was a 20% market share screen in the draft, it was left out of the final version of the Guidelines. Few issues received as much attention as the proposed screen in public comments on the draft, but in practice, the agencies rarely have challenged vertical mergers unless the parties' upstream and downstream market shares were substantial, often more than 50%.

[8]A number of antitrust authorities outside the U.S. include market share screens in their vertical merger guidance. For example, the European Commission is "unlikely to find concern in non-horizontal mergers" when post-merger market share is below 30% (and a measure of concentration is below a certain level). Japan has a 35% share threshold (and a concentration threshold). And, in China, vertical mergers qualify for expedited review and clearance if share is less than 25%.

[9]Nor do the Horizontal Guidelines for what it is worth.

[10]Examples include information firewalls, forced arbitration, compulsory licensing, access or fair dealing requirements, and supply agreements, among others.

[11]Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., Remarks at the Federal Telecommunications Institute's Conference in Mexico City (Nov. 7, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute ("The Division has a strong preference for structural remedies over behavioral ones.").

[12]Both agencies sometimes require temporary behavioral commitments to effectuate a structural divestiture, *e.g.*, a supply agreement, firewall, or license.

[13]FTC, The FTC's Merger Remedies 2006-2012, at 7 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[14]Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK, Inc. by Northrop Grumman Corp., File No. 181-0005 (June 5, 2018), https://www.ftc.gov/system/files/documents/cases/1810005_northrop_bureau_statement_6-5-18.pdf ("The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction. This settlement does not depart from that policy."); *see infra* note 14.

[15]Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., Keynote Address at American Bar Ass'n Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar ("That is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there's a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It's a high standard to meet.").

[16]FTC, A Guide For Respondents: What to Expect During the Divestiture Process, at 1 (June 2019), https://www.ftc.gov/system/files/attachments/merger-review/a_guide_for_respondents.

pdf.

[17]*See supra* note 14.

[18]*See e.g.*, Response of Plaintiff U.S. to Public Comment on the Proposed Final Judgment, *U.S. v. Learfield Commc'ns, LLC*, Case No. 1:19-cv-00389, at 14 (D.D.C. Feb. 3, 2020), https://www.justice.gov/atr/case-document/file/1243546/download (noting that the merging parties "unilaterally implemented several irrevocable changes to . . . the contractual rights of employees and customers . . . [that] increased the [DOJ's] litigation risk for seeking to enjoin the transaction").

IS IT TIME FOR A TOEHOLD ACQUISITION?

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This year's market volatility and low valuations for some companies has increased interest from potential acquirers on minority "toehold" acquisition strategies. In our experience, toehold acquisitions raise a number of challenges and limited advantages, making it a rare fit for most transactions. However, for those potential acquirers who wish to explore such an option, we discuss some of the key considerations and regulatory framework in deciding whether to take a toehold.

U.S. Regulatory Scheme

The key U.S. regulatory schemes relevant to toehold acquisitions contribute significantly to defining the advantages and disadvantages of the strategy. In general, the larger the stake that a potential acquirer can accumulate before disclosure, the greater the benefit of the strategy, but U.S. beneficial ownership disclosure, antitrust, and certain antitakeover and regulatory requirements effectively cap undisclosed toeholds at lower levels, as we highlight below.

Section 13 Beneficial Ownership Disclosure Requirements under the Securities Exchange Act of 1934 (the "Exchange Act")

Schedule 13D. U.S. securities laws require, for acquirers with a control intent, disclosure on a Schedule 13D of beneficial ownership of 5% or more of a public company's voting securities within 10 days of crossing that threshold. A potential acquirer may purchase as much stock as possible within the 10-day period (subject to other regulatory considerations such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and state antitakeover laws discussed below). Once subject to 13D disclosure requirements, material changes in the acquirer's position (including changes of 1% or more in the position) must be disclosed promptly in an amendment to the Schedule 13D. Derivative positions will typically need to be disclosed on a Schedule 13D, but are counted for purposes of determining initial beneficial ownership only if the derivative gives the holder the right to acquire beneficial ownership of the company's stock within 60 days.

Form 13F. If the potential acquirer is an institutional investment manager (including private equity and hedge funds) with assets under management of over $100 million, then the toehold position may also need to be disclosed on Form 13F. A qualifying investment manager