
Structuring Deals

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DOING DEALS 2015

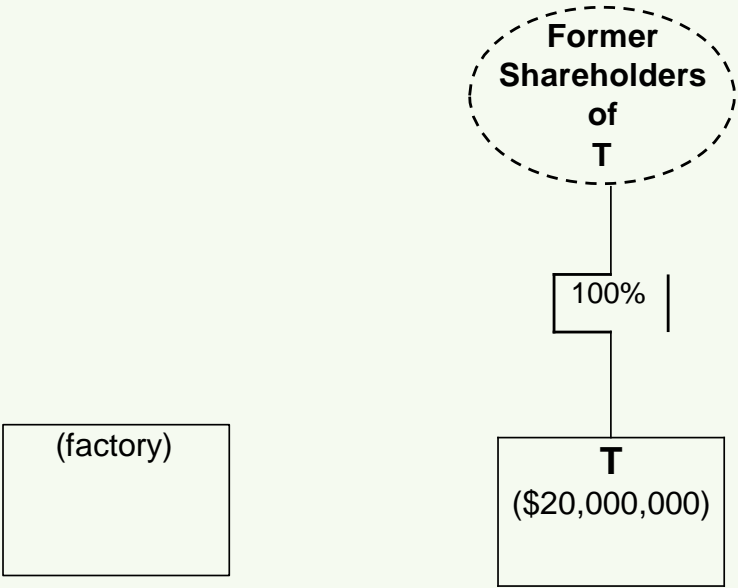
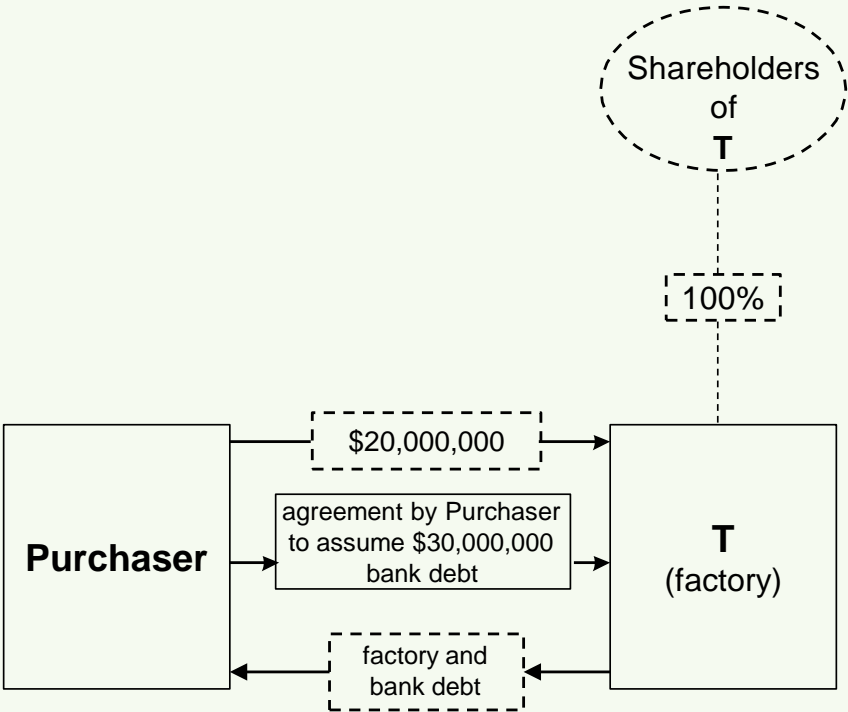
Acquisition Methods

Broad Range of Acquisition Agreements

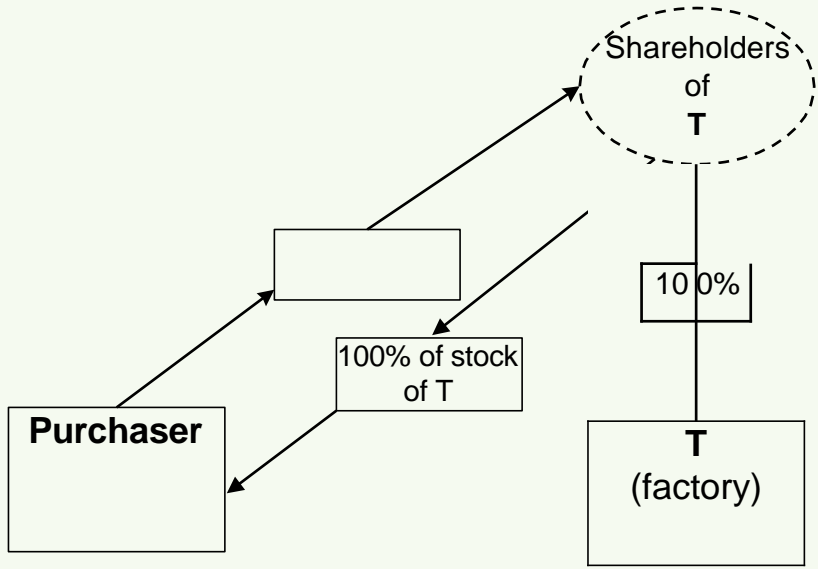
I.	Investment Agreement		
II.	Asset Purchase Agreement		Private
III.	Stock Purchase Agreement		Usually Private
IV.	Merger Agreement (one-step)		Generally Public
V.	Merger Agreement (with tender offer)		Public

Purchase of Assets

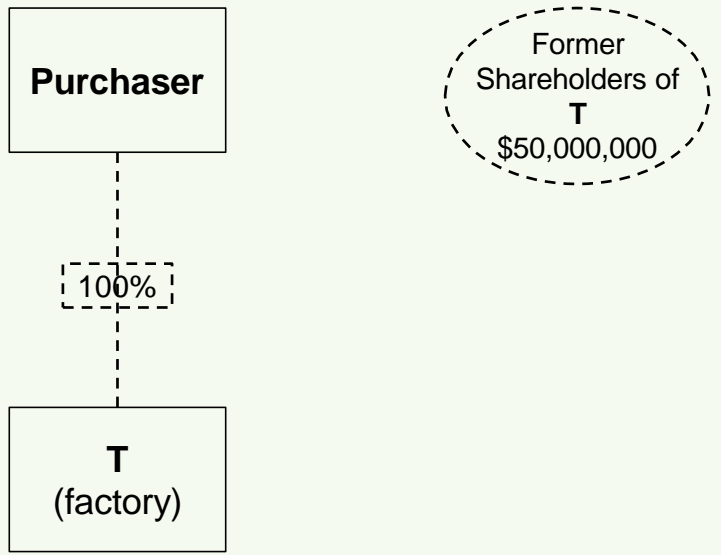
After the closing:



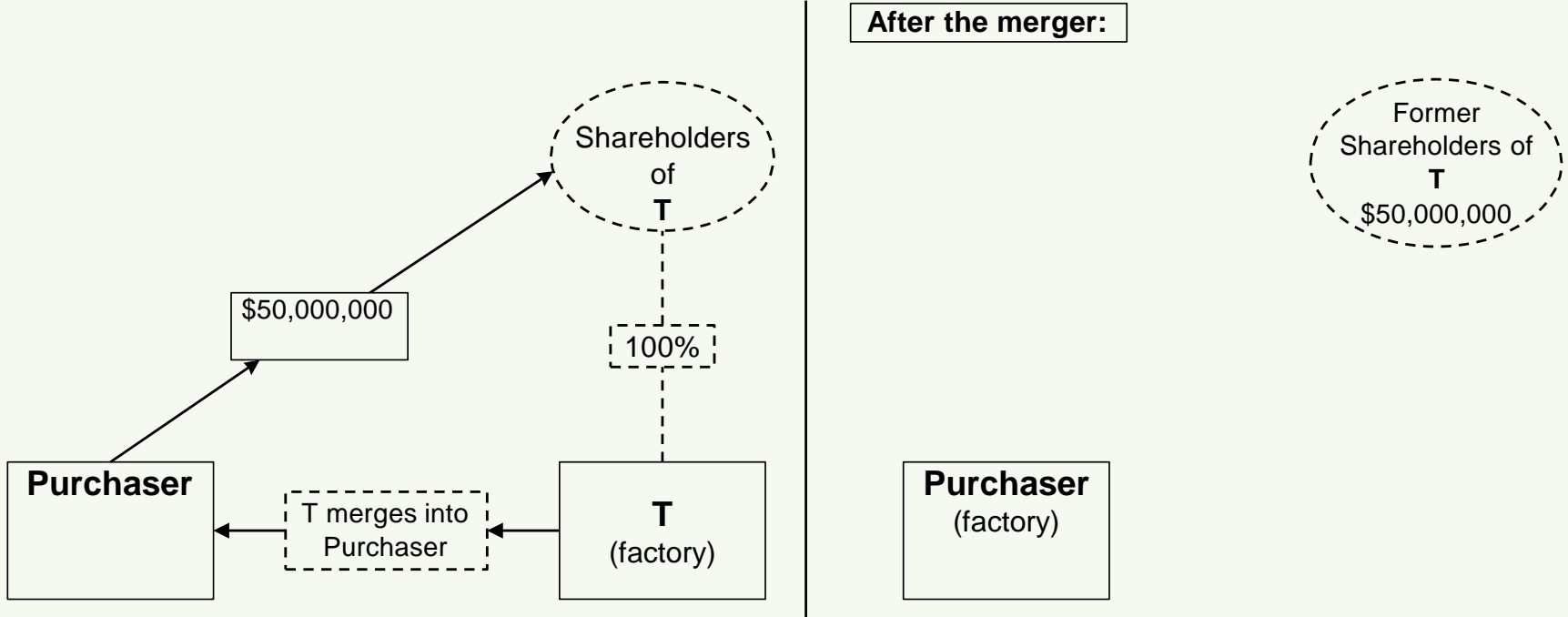
Purchase of Stock



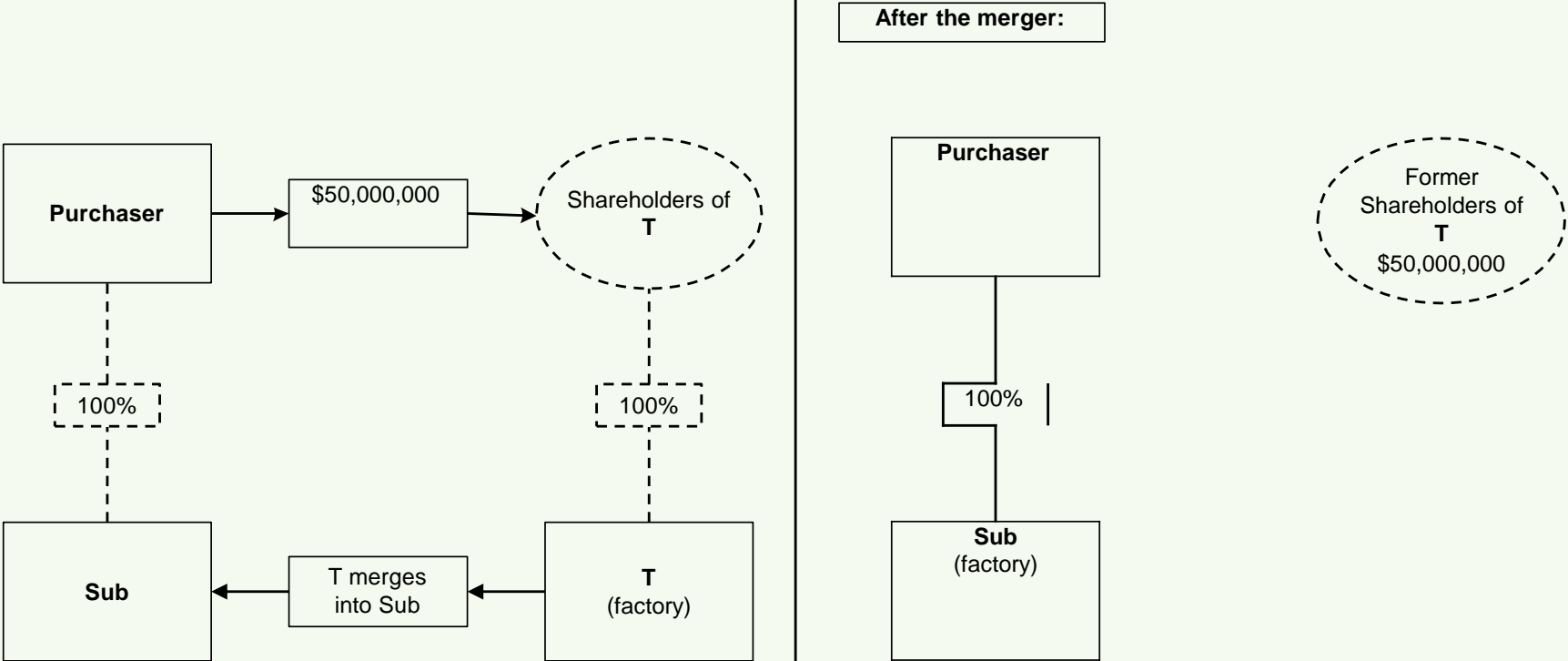
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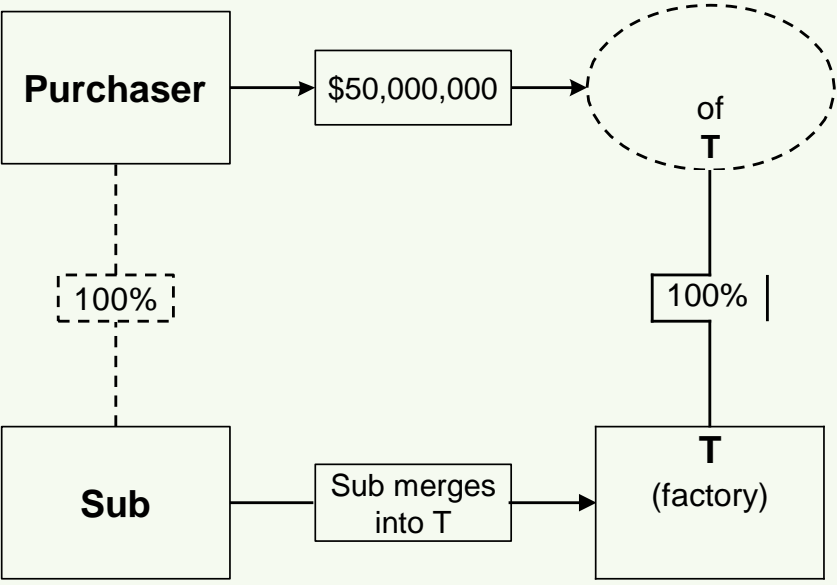
Forward Merger



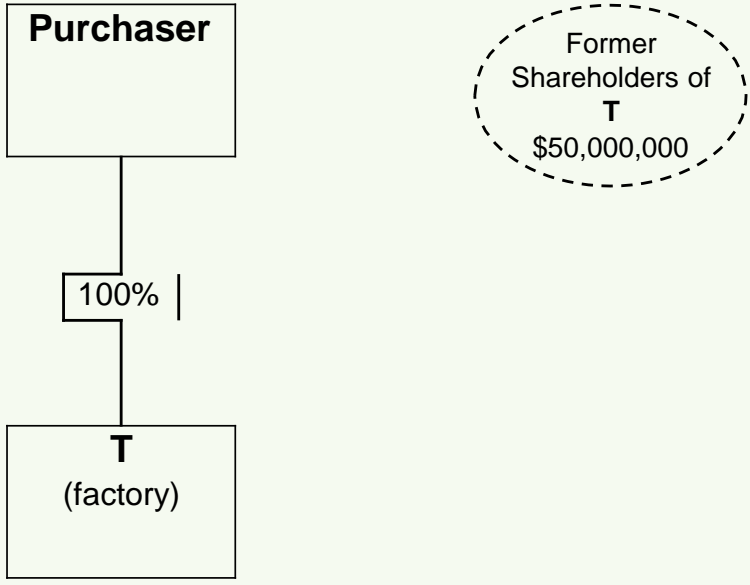
“Forward Subsidiary” Merger



“Reverse Subsidiary” Merger

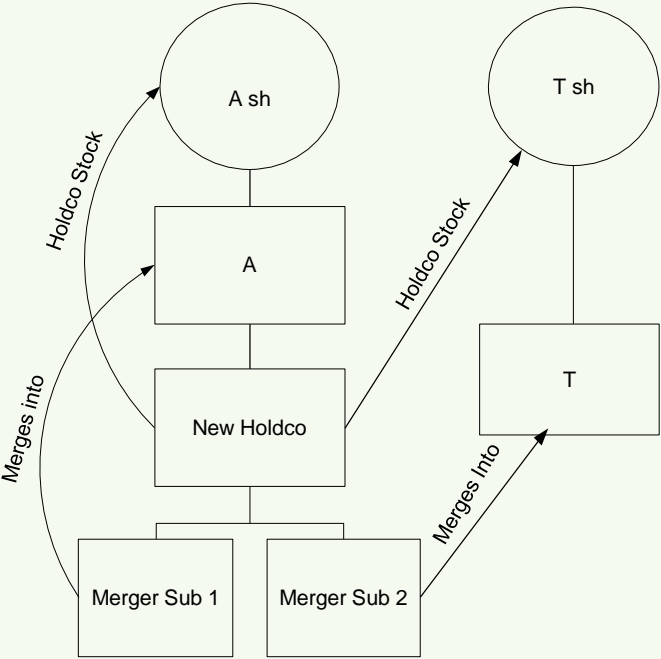


After the merger:



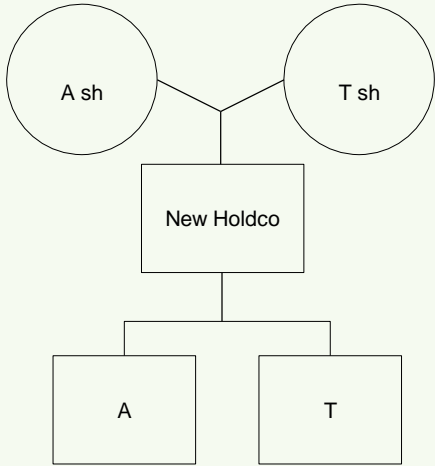
Double Dummy/Holding Company Merger

Before:



- A creates a new subsidiary ("New Holdco"), with two "dummy subs" of its own
- Merger Sub 1 merges into A and Merger Sub 2 merges into T
- A and T survive as wholly-owned Subs of New Holdco
- Stockholders of A and T receive stock of New Holdco in exchange for their A and T stock

After:

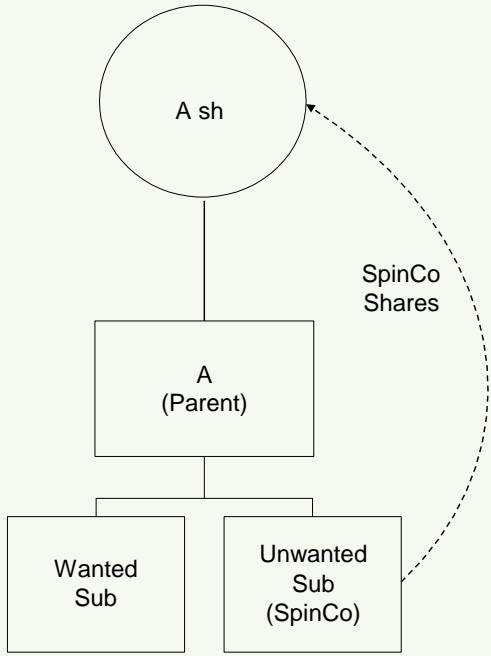


As an alternative, New Holdco could launch an exchange offer for A and T

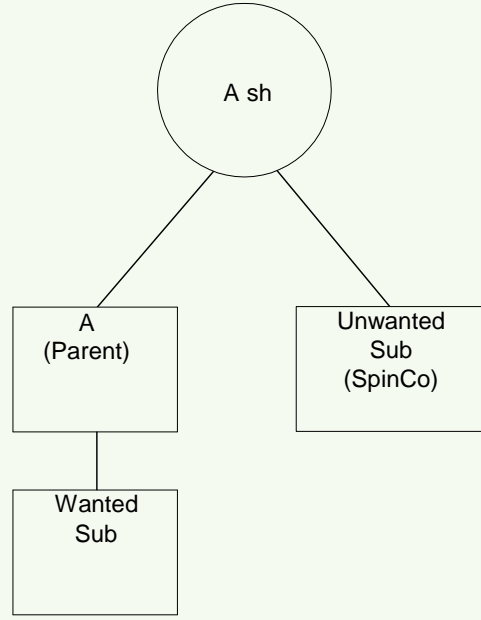
Spin-Off

- A separates spin-off assets/businesses into single subsidiary ("SpinCo")
- A distributes shares of SpinCo to A's stockholders as a tax-free dividend

Before:



After:



Deal Structure Driven by Many Factors

Basic Questions about Target

- (a) Public company/private company
- (b) Private company – number and identity of equityholders
- (c) State of incorporation
- (d) What is Acquiror buying?

Corporate Law

- (a) Target shareholder approval
- (b) Acquiror shareholder approval
- (c) Appraisal rights

Tax Considerations

- (a) Cash
- (b) Stock
- (c) Hybrid cash & stock/other
- (d) Tax benefits
- (e) Pass-through treatment

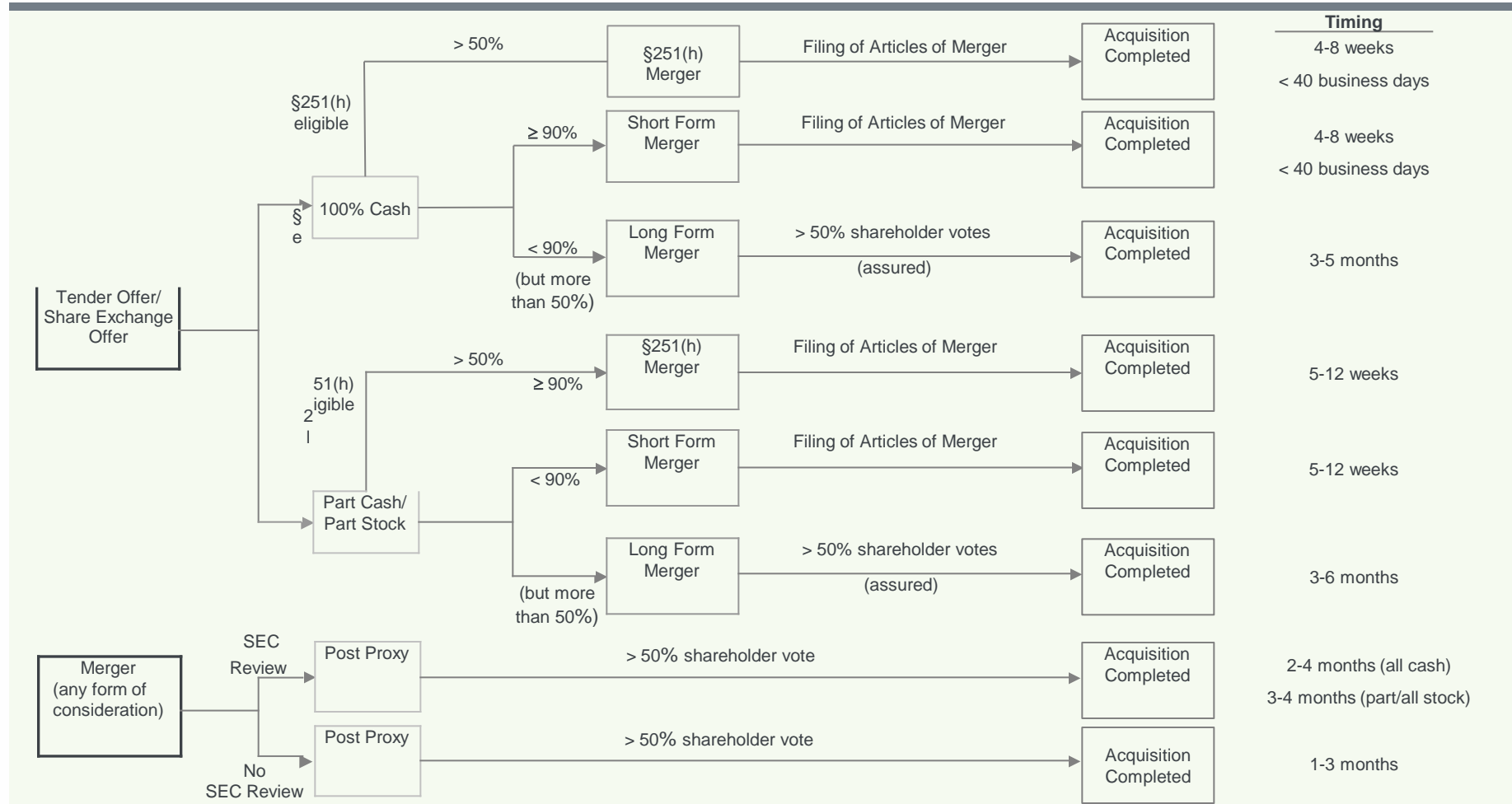
Timing/Other

- (a) Relative leverage of the parties
- (b) Liability profile of the target business
- (c) Financing structures
- (d) Buyout fund structures
- (e) Third party/other consents, regulatory requirements
- (f)) State statutes
- (g) Optimal/political considerations

Acquiring a Public Company

(for simplicity, assuming a Delaware target)

Methods of Acquisition of a Delaware Public Company



Tender Offers and Section 251(h) of the DGCL

- Tender offers are frequently used as the first step in the acquisition of all of a Target's common equity and must be followed by a "back-end" merger, where the bidder squeezes out the remaining shareholders for the same consideration offered to shareholders in the tender offer
- Under Delaware law, a back-end merger following a tender offer has long required shareholder approval unless the acquirer owned following the completion of the tender offer at least 90% of each class of target stock otherwise entitled to vote on the merger
 - Effective August 1, 2013, Delaware eliminated the possible need for shareholder approval for second-step squeeze-out mergers in qualifying two-step acquisitions
 - Under new Section 251(h) of the DGCL (as amended), shareholder approval is not required for the back-end merger if, following the tender offer, the acquirer owns at least the percentage of stock that would otherwise be required for stockholder adoption of the merger agreement (typically >50%) subject to eligibility and other requirements
 - Under Section 251(h), the squeeze-out merger is expected to occur on the same day that the tender offer is consummated

Section 251(h) Eligibility Criteria

- Negotiated two-step transaction
- Delaware target that is a public company — any class or series of stock either listed on a national securities exchange or held of record by more than 2,000 holders
- Target did not opt out of the new second-step squeeze-out merger statute in its charter

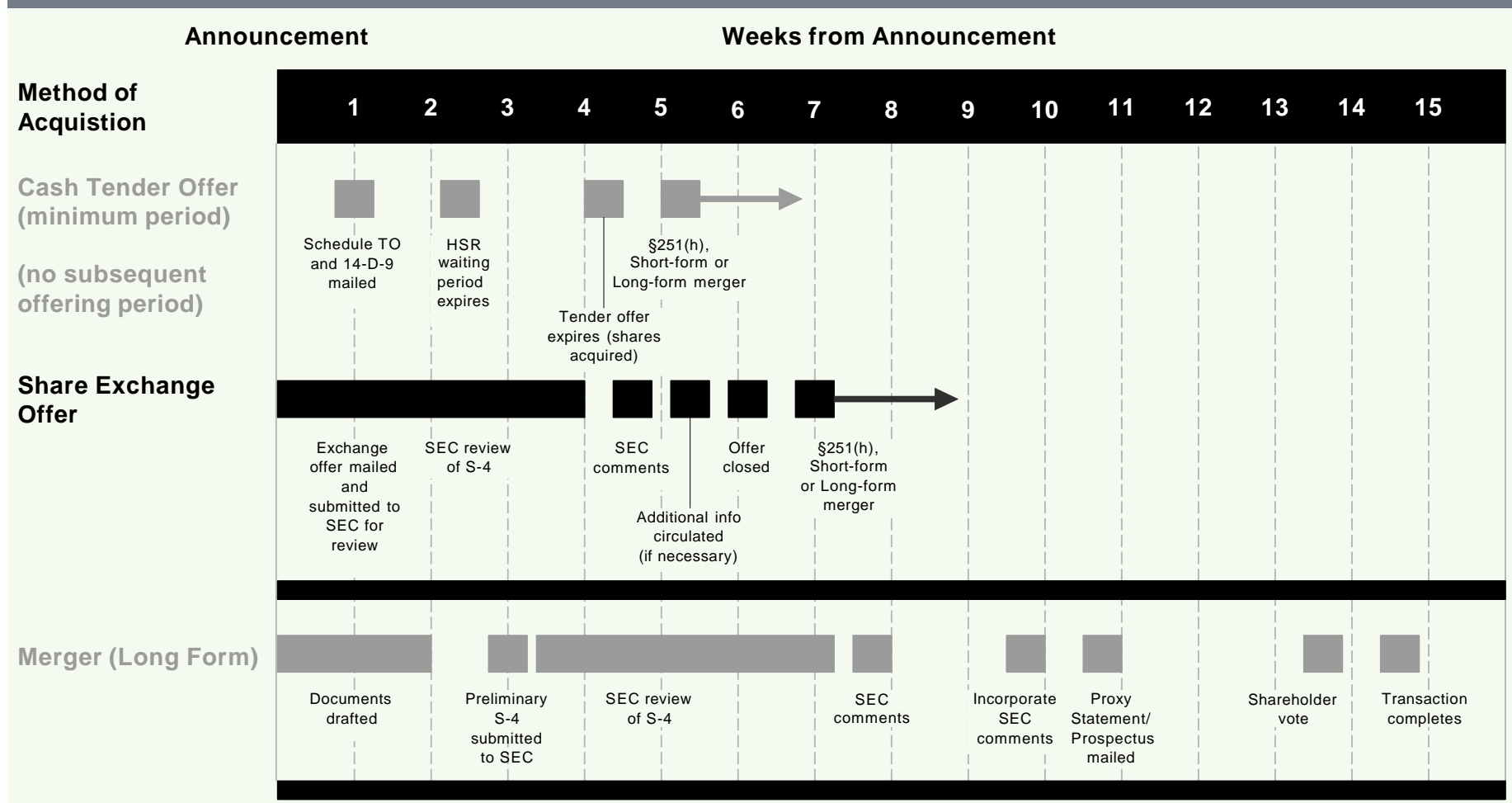
Section 251(h) Requirements

- *Express Provision*: Merger agreement must expressly
 - “permit or require” the merger to be effected under §251(h) and
 - “effected as soon as practicable following the consummation of the offer”
- *Tender offer for all voting stock*: Offer must be for all of the outstanding stock that otherwise would be entitled to vote on the merger agreement (excluding shares held by target, bidder or any of their affiliates or rollover stock)
- Recent amendments clarify that the offer may be conditioned on the tender of a minimum number or percentage of shares, and that the offer may be effected through separate offers for separate classes or series of stock
- *Fait accompli*: Following consummation of the offer, the acquirer must own at least the percentage of stock (including stock owned by affiliates and rollover stock) that would otherwise be required to adopt the merger agreement under Delaware law and the target’s governing documents
- *Completion*: The corporation consummating the tender or exchange offer merges with or into the target pursuant to the merger agreement
- *Same price*: The consideration paid for subject shares not tendered and accepted in the offer is the same (in amount and type) as the consideration paid for the shares in the offer (determined on a class-by-class basis where applicable)

Advantages and Disadvantages of Tender/Share Exchange Offer vs. Long Form Merger

Issues	Tender/Share Exchange Offer	Long Form Merger
Timing	Shorter time to achieve control and foreclose interloper risk	May be shorter time to achieve 100% ownership and ability to integrate; facilitates a longer market check
Complexity	Less complex than merger if 100% cash offer	May be less complex than share exchange offer and “back end” merger if offer is all/part shares
Documentation	Simpler documentation if 100% cash	Detailed documentation proxy statement requiring SEC pre-clearance
Success	Tender/Share Exchange Offer: Expectation is buyer will acquire >50% but will not immediately acquire 100% of target stock in the tender offer	Achieve 100% ownership in one-step after shareholder vote, or acquisition/merger fails
Market practice	Generally achieve control of target after 20–40 business days	Achieve control after 2–4 months (4 months to closing where there is SEC review of stock deal)
Antitrust (HSR) clearance (assuming no delay for further government review)	HSR waiting period is 15 days for a cash tender	HSR waiting period is 30 days for a merger

Illustrative Timelines



Benefits of a Tender Offer vs. a One-Step Merger

- **No Pre-Clearance.** SEC pre-clearance of cash tender offer materials is not required before mailing to target shareholders. SEC review of cash tender offer materials after distribution is often limited.
- **Speed.** A cash tender offer can be completed relatively quickly — **20 business days following commencement in the case of a friendly deal** not involving any regulatory or other timing impediments (Section 251(h) eliminates prior delays in completing back-end merger)).
- **Direct.** A tender offer is made directly to shareholders and does not require a shareholder meeting or board approval (could be used for hostile offer, although Section 251(h) may not be used).
- **Freeze Out.** A tender offer between parent/subsidiary may be able to avoid entire fairness heightened review so long as certain conditions (e.g., majority of minority and use of informed special committee) are met.

Benefits of a Tender Offer vs. a One-Step Merger *(cont.)*

- **Best Price Litigation Risk.** Bidders have been subject to litigation risk for alleged violations of “Best Price” rule. See discussion below regarding protection afforded by amended SEC rule.
- **Other**
 - Ordinarily no ISS recommendation
 - No record date – avoids “dead vote”
 - Full service brokers will track down retail clients for a tender offer but not for a shareholder vote

Benefits of a One-Step Merger vs. a Tender Offer

- **Possible Timing Advantage.** If regulatory approvals or other conditions delay consummation of a tender offer for more than approximately three to four months, a one-step merger can be completed more quickly than a two-step tender offer/merger that does not obtain tenders sufficient for a short-term merger.
- **Possible Reduced Interloper Risk.** In merger agreements, fiduciary outs usually terminate at shareholder vote; in a delayed tender offer, interloper risk can extend longer.
- **Acquisition of Target Shares in the Market.** A bidder is prohibited from acquiring shares outside of a tender offer. An acquiror not making a tender offer may acquire target shares during the pendency of its proposal subject to any applicable legal or contractual restrictions.

Impact of DGCL §251(h) on Tender Offers and Private Equity

Financial Sponsors Historically Have Been Less Able to Utilize the Two-Step Structure than Strategic Buyers

U.S. Public Target Acquisitions >\$500M from January 1, 2010 – August 1, 2013 (the §251(h) effective date)



Source: Factset Research

- Historically, a two-step structure frequently posed challenges in obtaining financing
- Lenders were delayed in being able to assert a direct claim on the target until completion of the second-step merger
- If the target's cash-on-hand is an intended source of funding, delays in utilizing that cash can increase the interim financing required to close on the first step tender offer
- Federal margin rules limit a lender's ability to extend credit for purpose of buying or carrying "margin stock" (including publicly-traded securities) if the credit is secured (directly or indirectly) by such stock
 - The target's securities will be valued at 50% of market value if used as security for the loan

Public Company LBOs without Regulatory Impediments Can Now More Easily Be Structured to Benefit from Two-Step Acquisitions

- Transactions which satisfy the requirements for §251(h) can close the tender offer and the merger on the same day
- Lenders can fund directly into the target permitting the proceeds of the loan and excess cash at the target to be used to fund the acquisition
- As is typically the case now, consummation of the merger will be a condition to funding
- Targets that have not adequately shopped themselves pre-announcement may still seek go-shops and longer than required minimum periods before closing the tender offer
- Section 251(h) may be used by financial sponsors that require large equity rollovers by the target's management team by effectively treating management-owned stock that is rolled over in the transaction as owned by the acquirer for purposes of satisfying the minimum condition, even though the rollover stock is not required to be transferred to the acquirer until after the completion of the tender offer

The Tender Offer Rules

The Tender Offer Rules

- Types of Tender Offers
 - Third Party Equity Tender Offer
 - “Going Private” Transaction
 - Exchange Offer
 - Cross-Border Tender Offer
 - Issuer Self-Tender Offer
 - Debt Tender Offer

The Impact of the Tender Offer Rules *(cont.)*

- What is a Tender Offer?
 - The Williams Act does not define the term “tender offer.”
 - The courts have used two tests to determine whether a series of purchases or offers constitutes a “tender offer” within the meaning of the Williams Act:
 - Eight Factor Test – No single factor dispositive and you need not have all eight factors.
 - active and widespread solicitation of public shareholders;
 - solicitation for a substantial percentage of target’s stock;
 - offer made at a premium over the prevailing market price;
 - terms are firm rather than negotiable;
 - offer contingent on the tender of a minimum number of shares;
 - offer open for a limited period of time;

The Tender Offer Rules *(cont.)*

- offeree subjected to pressure to sell stock; and
- public announcements precede or accompany rapid accumulation of large amounts of target's stock.
- Totality of Circumstances Test – some circuits focus on the totality of the circumstances to determine whether there is a likelihood that, unless Section 14(d) is complied with, there will be a substantial risk that shareholders will lack information needed to make a carefully considered evaluation of the bidder's proposal/offer.
- Why does it matter whether a bidder or issuer is engaging in a tender offer?
 - once tender offer is being made, the relevant regime of SEC rules – e.g., 14D, 14E, 13e-4, 15e-3 - must be complied with.

The Tender Offer Rules *(cont.)*

■ Exchange Offers

- Rules permit third-party exchange offers to commence upon filing of the registration statement. To commence offer early (before effectiveness), the bidder must:
 - file a registration statement including a preliminary prospectus containing all information (including price) necessary to allow holders to make an informed investment decision;
 - disseminate the preliminary prospectus to all security holders; and
 - file a tender offer statement (Schedule TO) with the SEC.
- Any securities tendered in the offer may not be purchased until after the registration statement becomes effective and the minimum 20 business day tender offer period (from commencement) has expired.

The Tender Offer Rules *(cont.)*

■ Minimum & Subsequent Offering Period

- Rule 14e-1(a): requires that a tender offer be held open for not less than 20 business days from commencement. No maximum offering period.
- Rule 14e-1(d): bidder may extend its offer by issuing a public notice of extension, including disclosure of the approximate number of securities tendered to date, no later than 9:00 a.m., Eastern time (or if the class of subject securities is listed on any national securities exchange, the opening of trading on such exchange) on the next business day after the scheduled expiration date of the offer.
- Rule 14d-11: a bidder may provide an optional subsequent offering period – not necessary in the context of a Section 251(h) transaction – after completion of a tender offer during which security holders may tender their shares without withdrawal rights (similar to extended offering period under U.K. law).

The Tender Offer Rules *(cont.)*

- Among the requirements for a subsequent offering period:
 - Initial tender offer must be for all outstanding shares.
 - Bidder must announce results of initial offering period (shares tendered) and must accept and promptly pay for all securities tendered during the initial offering period at the closing of such period.
 - The subsequent offering period is at the option of the bidder and, if provided, must be open at least 3 business days and not more than 20 business days. Bidder is not required to state in its initial tender offer whether or not it will provide a subsequent offering period.
- Announcement of a Target's Position
 - “Stop, Look and Listen” Communication - requests that shareholders defer making any determination whether to accept or reject the tender offer until they have been advised of the target company's position with respect to the offer.

The Tender Offer Rules *(cont.)*

- Rule 14e-2(a) requires the target's Board, no later than 10 business days from date of commencement, to disclose its position with respect to the offer on Schedule 14D-9.
- This applies whether the tender offer is friendly or hostile. However, it is customary in friendly deals for the target's response to be filed and mailed simultaneously with the bidder's materials.
 - The target board has four options:
 - it may affirmatively recommend acceptance of the offer;
 - it may affirmatively recommend rejection of the offer;
 - it may state that it is expressing no opinion and is remaining neutral; or
 - it may state (if such is the case) that it is unable to take a position.
- The target is prohibited from making a recommendation or solicitation in response to the commencement of the tender offer unless it files its Schedule 14D-9 on the date of such communication.

The Tender Offer Rules *(cont.)*

- “All holders”/“Best price” Rule – Rule 14d-10
 - “All holders” rule: tender offer must be open to all security holders of the class of securities subject to the offer.
 - “Best price” rule: the “best price” rule (which provides that consideration paid to any security holder must equal the highest consideration paid to any other security holder) was revised by the SEC in 2006 to resolve conflicting interpretations of the rule by courts, several of which determined that certain non-compete and other executive compensation payments were disguised tender offer consideration that must also be paid to all holders of the shares that were subject to the offer. The revised rule:
 - Amends the basic standard: clarifies that the rule applies only with respect to consideration offered and paid for securities tendered in a tender offer. Specifically, no one may make a tender offer unless “[t]he consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.”

The Tender Offer Rules *(cont.)*

- Provides an exemption for compensatory arrangements: includes a specific exemption from Rule 14d-10 for the negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement if the amounts payable under the arrangement relate solely to past or future services or future services to be refrained from and are not based on the number of shares the executive owns or tenders.
- Provides a safe-harbor for arrangements approved by independent directors: most practically significant aspect of the amendments is the “safe harbor” provided by revised Rule 14d-10(d)(2), which provides a safe-harbor from the best price rule for any compensatory arrangement that is approved by the compensation committee of independent directors of the target, regardless of whether the target is a party to the arrangement; or (if the bidder is a party to the arrangement) approved by the compensation committee of the bidder. In other words, approval by the target’s board is sufficient to satisfy the requirements of the safe harbor even if the target is not a party to the compensation arrangement.

The Tender Offer Rules *(cont.)*

■ Rule 14d-10 Timing Considerations

■ Defining the time frame of the tender offer:

- “Tender Offer” is not defined in the Federal securities laws.
- Date of Commencement - Under Rule 14d-2(a), a tender offer commences for purposes of the Best Price Rule “at 12:01 a.m. on the date when the bidder has first published, sent or given the means to tender to security holders.”
- Under Rule 14e-5, the prohibition on purchases outside the tender offer begins upon public announcement, not commencement.
- There is no rule that specifies when a tender offer will be deemed to have ended. Although tender offers are required to be kept open for 20 business days under Rule 14e-1, courts have declined to hold that the expiration date constitutes the end of the tender offer for purposes of the Best Price Rule.