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SELECTED LEGAL ISSUES RELATING TO THE SELECTION AND IMPLEMENTATION OF DIFFERING FORMS OF CONSIDERATION IN M&A TRANSACTIONS

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Historically, the fundamental decision to use stock or cash as the form of consideration (e.g., all stock, all cash or a combination thereof) in any M&A transaction has been a business decision to be made by the prospective purchaser and target companies, with the consultation of their respective investment bankers and tax and legal advisors, and typically has been related to many factors, including the need for certainty of ownership split or deal value or level of dilution, the availability of financing and its cost, the tax basis of any controlling holders of target stock and the desirability and anticipated performance of the purchaser's stock. In the immediate aftermath of the "Great Recession," while showing signs of strengthening, strategic M&A activity still remains depressed from historical levels as the majority of prospective buyers wait on the sidelines for signs of a sustained recovery before redirecting resources away from core operations. The transactions announced since the start of 2009 have tended to build upon a company's core strengths rather than implement a fundamental change in strategic direction. The focus on strategic fit and continued reduction of competition from private equity firms has encouraged the trend toward the use of stock in deals in lieu of cash (it is reported that nearly 50% of all non-PE deals in 2009 involved stock as at least partial consideration); financing is still a challenge for all but the most sterling credits and stock (at least as partial consideration) remains an important deal consideration of choice (if not necessity) for those others. The bursting of the global asset bubble over the last couple of years triggered fundamental asset repricing across industries and complicated the valuation of target companies. In a relatively stable market, the use of stock as deal consideration addresses some of these challenges by providing a prospective purchaser with transaction currency and allowing target stockholders the opportunity to participate in potential upside. Periods of acute market volatility during this era added further complexity to the bargaining process. As the market stabilized in mid-2009, the risks of acute market volatility faded and stock became a more attractive form of consideration for buyers and sellers alike, both to address possible valuation issues and to substitute for continued credit constraints on non-blue-chip borrowers. Despite what appears to be a return to market equilibrium, recent shocks like the Dubai debt crisis remind us that systemic risk is the known unknown that must be addressed in structuring every deal. Although these fundamental market issues and the business decisions of any particular transaction are beyond the scope of this article, transactions using stock as consideration raise value and market risk issues that demand careful attention in any environment and must be addressed in the course of negotiation and drafting. This article provides a broad overview of the structural considerations that apply to the use of stock as transaction currency (especially in the mixed cash and stock context) and discusses some of the more prominent tools in the M&A toolkit to mitigate its attendant risks.

Annexes A through F contain charts outlining the key attributes of selected transactions including stock or mixed consideration announced from 2004 through the beginning of 2010.

MIXED CONSIDERATION ISSUES

Parties to a transaction may structure a deal so that target stockholders are paid mixed consideration, comprised of a combination of stock and/or cash. With this form of consideration, a threshold determination will be how to allocate the stock and cash.

- Parties may choose a unit structure in which a share of the target's stock entitles the holder to a proportionate share of the aggregate stock consideration and the aggregate cash consideration. This construct has the advantage of simplicity and equal treatment of all holders and eliminates any issues of over-subscription in one form of consideration, but has the disadvantage of treating in a uniform manner stockholders with different investment objectives and tax considerations. This structure was used in the majority of the 2007 and 2008 transactions, and a substantial portion of the 2009/2010 transactions, listed in Annexes D, E and F, respectively, including the largest consummated transactions of 2007 and 2009, the acquisition of ABN AMRO by Royal Bank of Scotland, Fortis and Banco Santander and the acquisition of Wyeth by Pfizer, respectively. Furthermore, as indicated in Annex A, J&J's thwarted effort to acquire Guidant is an example of a transaction that employed this structure with an added wrinkle, where each share of Guidant stock would have been converted into a unit consisting of the cash consideration and a number of shares of J&J determined pursuant to a "fixed value" formula with top and bottom collars. Boston Scientific, in its successful deal jump, used a similar "fixed value" structure.

- The other primary option is an election structure where stockholders of the target may choose between the two forms of consideration, but with limits typically placed on the aggregate amount of one or both types of consideration to be provided with pro rata treatment if one or the other form of consideration is oversubscribed. Recent examples of this structure are Tyco International's pending acquisition of Brink's Home Security Holdings, set forth in Annex F, in which stock elections are uncapped but cash elections are subject to proration and limited to approximately 30% of total merger consideration; Berkshire Hathaway's pending acquisition of Burlington Northern Santa Fe, set forth in Annex F, in which the cash and stock elections of Burlington Northern Santa Fe stockholders are subject to proration and reallocation in order to achieve a 60/40 cash-stock split; Microsoft's unsuccessful proposal to acquire Yahoo! in 2008, set forth in Annex E, where stockholders would have been offered the opportunity to choose between a fixed ratio of stock and an amount in cash (representing 50% of the total consideration), subject to strict proration limits on both; News Corp.'s 2007 acquisition of Dow Jones, set forth in Annex D, which involved only one-way proration, being essentially an all-cash deal (with cash being available to all of the Dow Jones stockholders), but permitting up to 250 Dow Jones stockholders (with election priority going to the largest electing holders), accounting for up to 10% of the company's stock, to swap their shares on a tax-free basis for non-trading class B units of a newly formed News Corp. subsidiary, which shares are then ultimately convertible into News Corp. common stock; and Barrick Gold's acquisition of Placer Dome announced in late 2005 (which resulted from a negotiated resolution to Barrick's original unsolicited exchange offer with a similar structure), set forth in Annex B, where stockholders were offered the opportunity to choose between a fixed ratio of stock and an amount in cash (representing 13% of the total consideration), subject to strict proration limits on both.

There are different techniques to address an oversubscription if more holders choose one type of consideration than there is available under the terms of the deal. The simplest solution is to provide for a straight proration of the oversubscribed form, resulting in the holders who selected the oversubscribed pool being cut back proportionately to the aggregate limit and put into the undersubscribed pool for the excess portion. The vast majority of the transactions listed in the annexes hereto employing an election structure used this method. Another solution is to correct the oversubscription using random selection or another equitable basis to reach the desired percentages, but these alternatives are more unusual.

An interesting twist is the use of the election mechanism in situations where the election process is combined with a "fixed ratio" structure on the stock component of the transaction, as opposed to a "fixed value"/floating ratio structure. In addition to the 2006 Mittal Steel/Arcelor SA transaction set forth in Annex C and a significant number of the 2005 transactions set forth in Annex B and the 2004 Harrahs/Caesars and Kmart/Sears transactions set forth in Annex A, all of the 2007, 2008 and 2009/2010 "election" transactions set forth in Annexes D, E, and F, respectively, used this form (with the exceptions of News Corp./Dow Jones, Berkshire Hathaway/Burlington Northern and Tyco International/Brink's). This combination is potentially less "effective", and historically less typical, as a pure choice of form (although as noted above, there seem to be more transactions structured this way recently). As discussed below, in a "fixed ratio" deal (as opposed to a "fixed value"/floating ratio deal), the value of the stock consideration rises and falls daily with the value of the purchaser's stock. As such, the value of the cash and stock prices are likely to diverge by the closing, making the election not one of form, but likely one of value. Thus, most holders (ignoring their tax and liquidity circumstances) will make the election that will yield the higher value. After giving effect to proration, the end result of the election will probably look much like the "unit" that would have been set at the beginning at any event! (Interestingly, in the 2010 Tyco/Brink's deal, the parties provided the additional choice of an upfront election for the equivalent of the blended cash/stock "unit.") Furthermore, while most sophisticated investors will elect to take the same higher value choice, holders who miss the election deadline or who are away on vacation or who are very unsophisticated (the so-called "widows and orphans") may end up in the lower value choice, thereby making this a less "friendly" technique to such holders than a unit structure.

Amendments to the SEC's cross-border tender offer rules in 2008 facilitated the ability of U.S. investors to elect different forms of consideration in cross-border tender offers that included an election option. Many cross-border tender offers feature a default unit structure but allow stockholders the option to elect a different proportion of cash and securities, to the extent that other tendering security holders make opposite elections (often referred to as a "mix and match facility"). The bidder typically sets a maximum amount of cash or securities that it will issue in the offer; to the extent that more tendering target stockholders elect cash or bidder stock, their elections are prorated to the extent they cannot be satisfied through "offsetting elections" made by other target stockholders. As described in the SEC's May 2008 release discussing certain proposed cross-border tender offer rule changes, mix and match offers have traditionally conflicted with U.S. requirements applicable to the subsequent offering period. First, those rules provide that a bidder may offer a choice of different forms of consideration in the subsequent offering period, but only if there is no ceiling on any form of consideration offered. In addition, the rules require a bidder to offer the same form and amount of consideration to tendering stockholders in both the initial and subsequent offering periods. Both requirements present difficulties in the context of mix and match offers. In these kinds of offers, bidders want to impose a maximum limit on either (or both) the amount of stock or the amount of cash they will be obligated to deliver if the offer is successful. In addition, the offset feature characteristic of mix and match offers is inconsistent with the prohibition on offering different forms and amounts of consideration in the initial and subsequent offering periods. Because of the prompt payment and other requirements of U.S. rules and the requirements of foreign law or practice in cross-border offers, bidders in mix and match offers historically requested relief from the SEC to use two different proration and offset pools in their offers: one for stock tendered during the initial offering period and another for stock tendered in the subsequent offering period with the result that the mix of consideration provided to tendering stockholders would likely be different in the initial and subsequent offering periods – for example, in its unsuccessful 2007 bid for ABN AMRO. Barclays plc received an SEC exemption to offer U.S.-based ABN AMRO stockholders the opportunity to participate in its mix and match facility. The 2008 amendments permitted bidders to use separate offset "pools" for securities tendered during the initial and subsequent offering periods in the context of mix and match cross-border tender offers and also eliminated the prohibition on a ceiling for the form of consideration in a mix and match offer. The current Kraft deal to acquire Cadbury takes advantage of these rule changes and includes a mix and match component.

- One less used but available approach is the so-called "equalizer" method that tracks the blended value of the cash/stock package, pays all stockholders that same blended value, but permits elections of cash or stock in amounts that follow agreed upon limits on the aggregate amount of cash and/or number of shares to be issued. The SunTrust Bank/National Commerce Financial transaction set forth in Annex A, the Capital One Financial/North Fork Bancorp and CBOT Holdings/Chicago Mercantile Exchange transactions set forth in Annex C, and the CME Group/NYMEX transaction set forth in Annex E are examples of this approach, insofar as the total per share value is a blend of a fixed cash amount and the trading value of a fraction of the purchaser's stock, and the aggregate amount of cash and/or number of shares to be issued is specified in the agreement. Holders could then elect to get that per share value in cash or stock subject to a cap on the aggregate cash and/or number of shares to be issued in the deal and proration mechanisms. The NYSE Group/Euronext SA transaction set forth in Annex C employed a similar approach by choosing a default unit structure but allowing stockholders to mix and match their individual allocations of cash and stock based on a blended value of the cash/stock package. In this case, the proration mechanisms of the original unit structure effectively capped the overall amounts of cash and stock available in the mix and match election.

- Other issues arising in drafting election mechanisms include the timing of the election (pre-meeting, pre-closing, etc.), deciding how to treat stockholders that do not submit an election and dealing with options and convertible securities.

RELEVANCE OF CONSIDERATION FORM ON REQUIREMENTS FOR TAX-FREE TREATMENT

For an acquisition to qualify as a tax-free "reorganization," it must satisfy both statutory requirements as well as meet certain judicial requirements, including the "continuity of interest" (COI) requirement.[1] COI requires that the target stockholders retain a continuing stock interest in the target corporation.

In order to determine whether the amount of consideration is adequate to satisfy COI, the stock consideration received by the target's stockholders as a group relative to the total consideration furnished by the acquirer must meet a certain threshold percentage. Legal tax practitioners are generally comfortable with COI amounts in the 40-45% range.[2]

COI is analyzed by looking at stockholders as a group, i.e. it would be acceptable for some stockholders to receive only cash and for others to receive only stock, so long as the

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1 There are a myriad of other rules and considerations that must be taken into account when structuring a transaction as a tax-free reorganization, including the structure of the acquisition (i.e., asset versus stock and whether by way of merger or not), which can impose additional requirements on the amount of stock and cash consideration.

2 Temporary regulations recently issued by the Internal Revenue Service contain an example that concludes COI was satisfied where stock represented 40% of the value of the consideration.

overall percentage of stock consideration meets the required threshold percentage.[3] Also, COI is determined by analyzing what the target stockholders received relative to the value of what is being transferred, not to the percentage of consideration received relative to all of the acquiring corporation's stock.

In general, the percentage of stock consideration is determined at the time of closing, thereby presenting the risk that where the number of shares of stock to be provided as merger consideration is fixed, a decrease in the value of the stock could affect COI.[4] When the COI is close to the line and there is a risk that the requirement may not be satisfied, there is often a provision in the underlying agreement to change consideration or change the structure if it could be undertaken to preserve tax-free reorganization status.

Under Temp. Reg. §1.368-1T(e)(2), in determining whether COI is met, consideration is valued on the last business day before the date of a binding agreement if the amount of consideration in the contract is fixed.[5] The consideration is considered fixed if the number of shares and the amount of money to be exchanged for the stock in the target is fixed, as in a "fixed ratio" structure. The consideration is not considered fixed if only the percentage of target's stock to be exchanged for the acquiring corporation's stock is fixed. Additionally, the consideration is not considered fixed when the target's shareholders are permitted to elect between stock and cash, unless the determination of the number of shares to be provided to a

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3 Please note that a stockholder who receives cash and stock in a given transaction will recognize gain (but not loss) up to the amount of the cash received, and a stockholder who receives only cash in a given transaction will recognize gain or loss.

4 In cases where consideration will be furnished post-closing, e.g., pursuant to escrow arrangements or earn-outs, COI will not be known at the time of closing, so care should be taken to make sure the type of consideration that can be received will not adversely impact the tax-free nature of the transaction. Temporary regulations issued in 2007 that are applicable only to contracts with fixed consideration provide a safe harbor for consideration placed in escrow to secure target's performance of customary covenants. These rules also allow for contingent consideration so long as the non-contingent consideration meets COI and the contingency does not prevent (to any extent) the target's shareholders from being subject to the economic benefits and burdens of ownership of the acquiring corporation's stock after the last business day before the first date the contract is a binding contract (as discussed below).

5 For an agreement to be considered "binding," it must be enforceable under applicable law. The presence of a condition outside of the parties' control, such as regulatory agency approval, will not prevent a contract from being considered binding. In addition, if insubstantial terms remain to be negotiated or customary conditions remain to be satisfied, the contract is nonetheless considered binding. However, if a term relating to the amount or type of consideration to be received is modified prior to the closing date, and the modified contract is a binding contract, the date of the modification shall be treated as the first date there is a binding contract. A modification will not result in a new valuation date, however, if the sole effect of the modification is to provide for additional shares of the acquiring corporation, to decrease the amount of money or other property to be delivered to the target's shareholders or a combination of the foregoing.

target shareholder is determined using the value of the acquiring corporation's stock on the last business day before the date there is a binding contract.

These rules offer the parties the potential for certainty with respect to COI at the time of signing and generally eliminate the need to provide for alternative transaction structures in case of interim changes in consideration value.[6] The COI rules applicable to Morris Trust transactions and tax-free spin offs generally are different than the COI rules described above and as a result these rules will not help alleviate similar issues that arise in Morris Trust transactions or tax-free spin offs related to merger transactions.

RISK ALLOCATION IN ALL-STOCK OR MIXED CONSIDERATION TRANSACTIONS

In all-stock or mixed consideration transactions, there are inherent risks on both sides that the agreed upon value may vary, sometimes substantially, between the signing and closing of the transaction as a result of changes in the price of the purchaser's stock. Such risks must be dealt with (or at least considered) in the pricing mechanism chosen for the transaction. The purchaser and the target must select between a "fixed ratio" deal (the number of purchaser's shares to be exchanged for target's shares does not change) and a "fixed value" deal (the number of purchaser's shares to be exchanged for target's shares fluctuates inversely with price movement in purchaser's shares in order to maintain a fixed value). Empirically, the attached charts show that, at least among the largest transactions, the vast majority of deals announced over the last six years have utilized a fixed ratio as opposed to a fixed value structure. In part, the predominance of fixed ratio deals can be attributed to the emphasis on ownership split that is typical in larger transactions, but the paucity of fixed value deals may also reflect the fact that in the stable, consistently rising bull market prior to the meltdown of 2008 target companies may have been happy to trade market risk for a more aggressive valuation. However, in the context of structuring a transaction that uses stock as consideration, a volatile market can be anathema to deal-making because in addition to the fundamental question of value, it accentuates the inherent tension between a seller's desire for certainty of value and a purchaser's desire to eliminate the risk of an unknown dilutive effect of a possible unexpected decline in its share price by fixing its potential stock issuance at signing. In practice, in an uncertain market the deals in which stock consideration would be particularly exposed to market swings are far less likely to emerge from the boardroom in the first place. Instead, as the 2009/2010 transactions listed in Annex F demonstrate, the transactions that can get done in a challenging environment are overwhelmingly between companies in similar, relatively stable industries (pharmaceuticals, energy, transportation, consumer goods, etc.), where the relative price movements of the two companies' stocks are likely to be tied to the same market forces.

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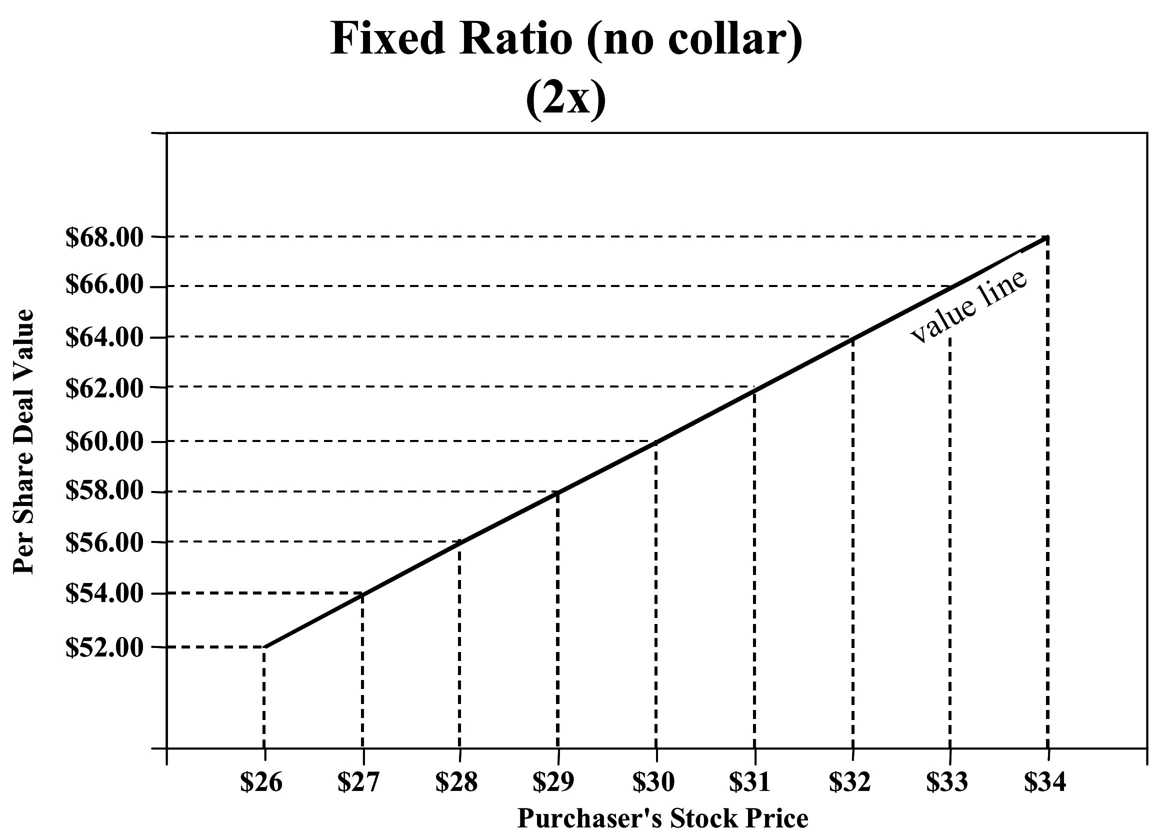
6 As noted above, COI is only one requirement that must be satisfied in structuring a tax-free reorganization. Depending on the acquisition structure, the parties may still need to address potential interim changes in value (*e.g.*, in a reverse subsidiary merger, the acquiring corporation must issue at least 80% of the value of the consideration as stock). For this purpose, the value determination is made at closing, not signing.

The following discussion highlights certain strategies to bridge this gap and help ensure that the bargain the parties made at signing is the same one they receive at closing.

Fixed Ratio Transactions

A fixed ratio transaction is one in which the purchaser and the seller agree at the time of signing on a specified ratio at which the parties' respective stock will exchange. The fixed ratio mechanism is frequently used in merger of equals transactions and large transactions generally where the business deal and valuation is more focused on fixing the ownership split of the resulting company between the two constituencies based on fundamentals, rather than on the possible deviations in trading value that market movements in the purchaser's stock will engender. It allows the purchaser to determine precisely how much stock it will issue in the transaction at the outset.

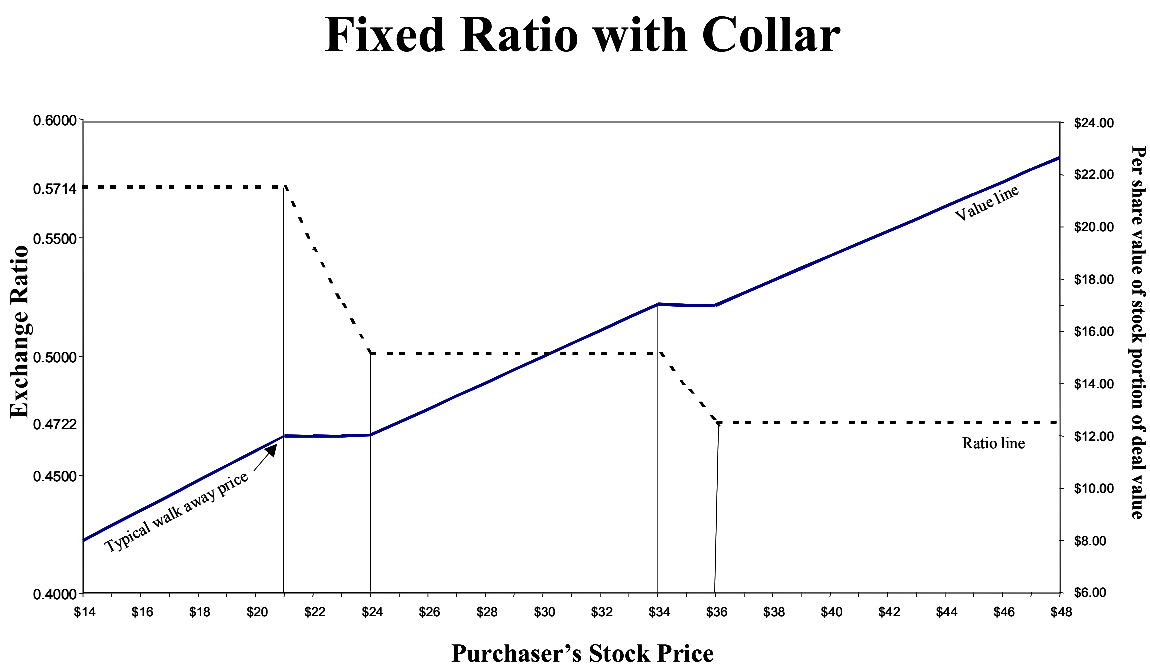


Although a fixed ratio without the protections described below may appear to present unacceptable risk to both the target and purchaser during a period of increased volatility or general economic uncertainty if the purchaser's stock price should rise or fall significantly from its value at signing, the parties to a merger of equals transaction or a transaction where the parties are otherwise in the same industry may find that their share prices have historically moved in unison. If that is the case, market-wide or industry-specific price movements should not impact the fundamental split in ownership reflected in the exchange ratio and its relative fairness to either party's stockholders. For example, at the height of the market dislocation in October 2008, Embarq Corporation agreed to a fixed exchange ratio with no protections in its merger with CenturyTel, Inc. The two companies primarily provided local telephone services but in different geographical areas, and over the two years prior to the transaction announcement their share prices moved in relative harmony. Such similarly situated companies, then, can have confidence that market gyrations will not disrupt the fundamental value split agreed upon at signing and that any significant deviation in share performance will likely be the result of company-specific events that can be addressed elsewhere in the merger agreement. In the distressed M&A context, such fears are largely irrelevant because targets have either had no bargaining leverage and been eager to recoup any value for stockholders (Bear Stearns) or otherwise operated from such a weakened state that the stock of potential purchasers was almost certain to weather the economic storm better than the depressed target (Wachovia and Merrill Lynch).

As indicated in Annexes A through F, the largest announced or proposed transactions since 2004 are all-stock examples of this form or included a fixed ratio stock component (e.g., in the January 2004 JPMorgan Chase/Bank One transaction, each share of Bank One common stock was exchanged for 1.32 shares of JPMorgan Chase common stock; in the January 2005 Procter & Gamble/Gillette transaction, each share of Gillette common stock was exchanged for 0.975 shares of Procter & Gamble common stock; in the February 2006 AT&T/BellSouth transaction, each share of BellSouth common stock was exchanged for 1.325 shares of AT&T common stock; in the November 2007 proposed but ultimately abandoned BHP Billiton/Rio Tinto transaction, each share of Rio Tinto common stock would have been exchanged for three shares of BHP Billiton common stock; in the September 2008 Bank of America/Merrill Lynch transaction, each share of Merrill Lynch common stock was exchanged for 0.8595 shares of Bank of America common stock; and in the January 2009 Pfizer/Wyeth transaction, each share of Wyeth common stock was exchanged for 0.985 shares of Pfizer common stock and $33.00 cash).

Although a fixed ratio is simpler, the value of the transaction will fluctuate based upon changes in the value of the purchaser's stock (i.e., as the value of the purchaser's stock increases, the target's stockholders receive greater value for their shares and vice versa). To protect the seller's stockholders from a decline in the purchaser's stock price (and the purchaser's stockholders from having to issue shares in aggregate exceeding the target's value in the case where the purchaser's stock price increases following announcement), the parties can agree to include collar features in the pricing mechanism. In such cases, the seller's stockholders would receive a fixed number of shares of the purchaser's stock unless the price of the purchaser's stock falls or rises beyond the specified collar range during the valuation period. If the purchaser's stock price moves outside of the specified collar range during the valuation period, there would be, within limits, an adjustment in the number of shares of the purchaser's stock to be delivered to the seller's stockholders. The precise contours of these deals are only limited by the imagination of the participants, and they can get quite complicated. It should be noted that if the transaction is a mixture of cash and stock, the cash portion of the consideration already serves to mitigate the value impact arising from movements in the purchaser's stock price.

As indicated in Annex B, a transaction that utilized the fixed ratio with collar mechanism is the 2005 Inco/Falconbridge transaction. Another illustration of how a collar mechanism can work in such a deal is reflected in the terms of the Jones Apparel/Nine West transaction from 1999 (where the consideration was a unit of cash plus stock) which is represented by the graph below:

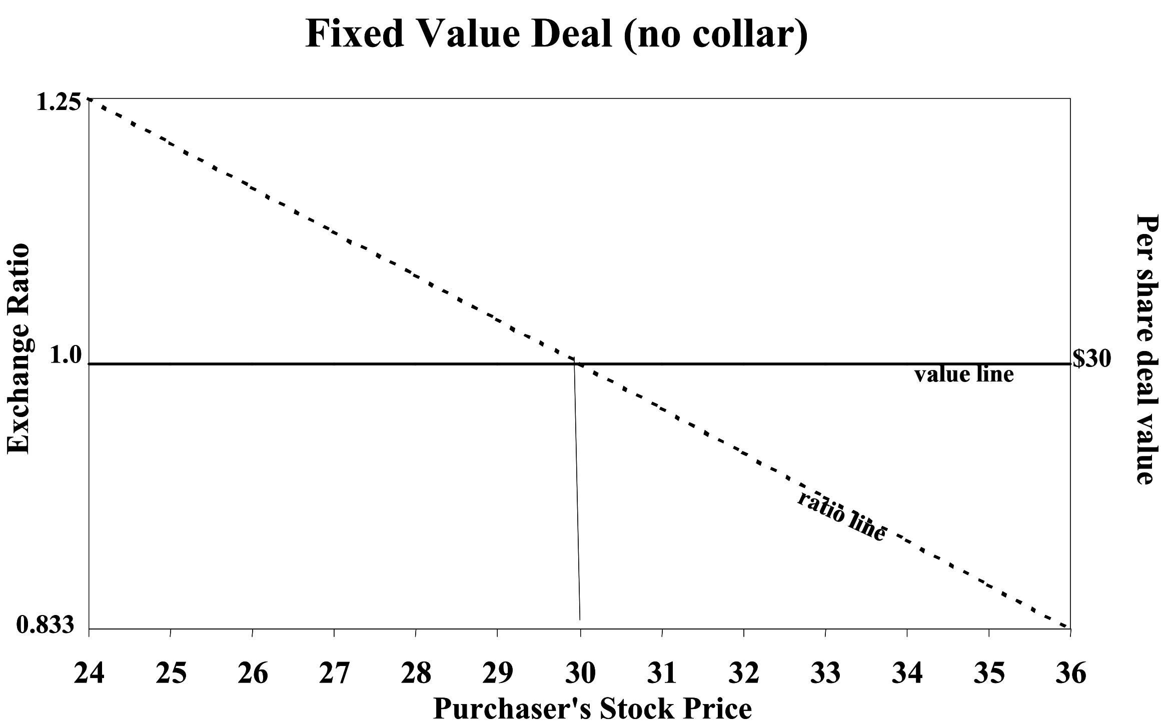


∗This illustration shows the relationship between the exchange ratio and the per share value of the stock portion of the deal as the purchaser's stock price rises or falls. Please note that in this transaction, the stock portion is part of a unit to which a per share cash consideration of $13 is added.

Fixed Value Transactions

The fixed value structure applies where parties to the transaction decide to deliver the seller's stockholders a fixed dollar value for each of their shares of the seller's stock, essentially using the purchaser's stock as a currency and deemphasizing the fundamental split in ownership that would have been arrived at in a "fixed ratio" deal. In this mechanism, the exchange ratio is set only at the closing, based on the average market price of the purchaser's stock for a period shortly prior to the closing date of the transaction, using a formula that would deliver an overall value agreed upon at the signing based on such average stock price (hence, it is said that the value is "fixed" and that the exchange ratio "floats"). It should be noted that even this type of structure will sometimes not achieve a perfect agreed upon value because the very act of using an average stock price to determine the ratio means that in a market that is consistently either rising or falling during the pricing period, the closing spot price would likely be higher or lower than the average price used for the formula.

In fixed value transactions without any caps and floors, the purchaser's stockholders bear all of the market risks in the transaction in the case of declines in the price of the purchaser's stock, but will also reap all of the benefits in the case of any price appreciation in the purchaser's stock between signing and closing, since the ratio will rise and fall to reflect the change in the stock price.



**This graph represents a segment of the relationship between the ratio and the purchaser's stock price at various spot prices. The same relationship will exist at other spot prices for the purchaser's stock.*

The core problem with a pure floating ratio mechanism is that the purchaser can experience massive dilution from a significant decline in its stock price, no matter the cause. As such, these deals are quite unusual unless there is some other protective mechanism to stem at some level the dilution that would result as the purchaser's stock price declines. One such mechanism is the standalone walk-away mechanism discussed below.

To provide protection against this sort of dilution, the purchaser is likely to place a collar or cap on the maximum number of its shares that may be issued in the transaction, and the seller may request a minimum number of shares that may be issued in the transaction (to be able to participate at some point in a meaningful upward tick, if any, in the seller's stock).[7]

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7 Whether or not employing the protective mechanisms discussed in this article (and especially in a volatile market that subjects a purchaser to additional market risk), a purchaser may seek to structure

There may be other reasons for a purchaser to place a collar or a maximum on the number of shares issuable in a transaction, for example to satisfy the NYSE or Nasdaq rules that an issuer not issue 20% of its stock without a vote.[8] Examples of this "fixed value with collar" structure are the J&J/Guidant transaction (which was trumped by the Boston Scientific/Guidant transaction) set forth in Annex A, the MetLife/Travelers transaction set forth in Annex B and the Berkshire Hathaway/Burlington Northern and Tyco International/Brink's transactions set forth in Annex F. Since the maximum share cap would result in a reduction in the deal value if the purchaser's stock falls below the cap, the target may negotiate to have a so-called "walk-away right" either at that point or at a pre-negotiated level below such point to allow it to terminate the deal if the value that was originally bargained for should erode as a result of the buyer's stock price falling (although, not in the J&J/Guidant failed transaction, the Boston Scientific/Guidant successful transaction or the pending Berkshire Hathaway/Burlington Northern and Tyco International/Brink's transactions). The buyer will often negotiate a "top-up right" to be able to elect to cancel the "walk-away right" and keep the deal alive if it is willing to add shares or cash into the deal that will bring its value back up to the walk-away value for the target's stockholders. As with the discussion of a fixed ratio deal above, the presence of a significant cash component in the transaction can partially mitigate the value impact of a fall in the purchaser's stock, and thereby affect the walk-away negotiations.

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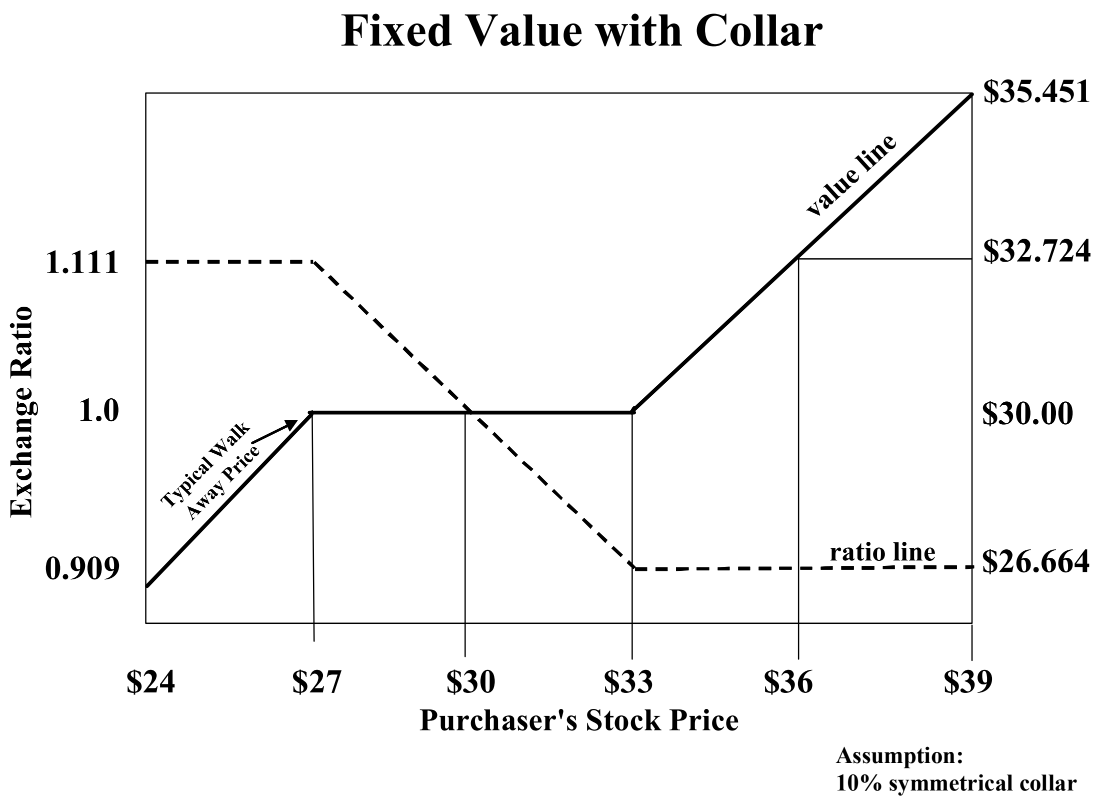
the transaction as an exchange offer in order to benefit from the timing advantage of exchange offers over mergers and reduce the time period between signing and closing.

8 For example, in Smithfield Foods' 2007 acquisition of Premium Standard Farms, each share of Premium Standard Farms stock was exchanged for (i) 0.678 shares of Smithfield stock and (ii) $1.25 in cash; however, the merger agreement provided that Smithfield could increase, by up to $1.00 per share, the amount of cash to be included in the merger consideration and decrease the fraction of a share of Smithfield stock by an amount having an equivalent value (based on a pre-closing trading formula), if Smithfield reasonably determined that those actions were necessary in order to avoid a shareholder vote under the NYSE rule for the additional shares to be issued in the transaction. In a similar protective measure incorporated into Pfizer's 2009 acquisition of Wyeth in order to avoid the NYSE's share issuance vote requirements, the Pfizer stock portion of the merger consideration would have been reduced to the minimum extent necessary so that the number of shares of Pfizer common stock issued as a result of the merger would equal no more than 19.9% of its outstanding common stock and the cash portion of the merger consideration would have been increased by an equivalent value.

In a competitive auction or "deal-jump" situation, a stock component that does trigger a purchaser shareholder vote (or SEC filing requirements) may be a significant liability. For example, in the early 2007 competition for Equity Office Properties Trust between Blackstone Real Estate Partners and Vornado Realty Trust, Vornado's mixed consideration offer, which would have required a Vornado shareholder vote, was rejected by Equity Office despite its higher overall compensation value to shareholders. Blackstone successfully argued that its lower, all-cash bid was superior because the Vornado vote effectively gave Vornado shareholders an option on the deal and provided far less certainty of closing in comparison.



**Please note that the chart does not show all the monetary combinations possible. The relationship will continue as the purchaser's stock price rises and falls.*

Although collars are typically symmetrical (providing protection at a standard deviation up or down), they can also be asymmetrical where the circumstance of the deal makes such a result logical. For example, in the acquisition of Frontier Corporation by Global Crossing in 1999, because Global Crossing's stock had rapidly increased in value immediately prior to entering into the merger agreement, Frontier wanted to ensure that it received adequate protection in the event of a precipitous decline in the value of Global Crossing's stock. Accordingly, Frontier's stockholders had "downside" price protection of approximately 30% on Global Crossing's signing date stock price with a floating ratio formula that adjusted the ratio upward to the full extent of an approximately 30% drop in Global Crossing's stock. In return Frontier's stockholders had to give up 10% of their "upside" since the formula "fixed" the ratio only after a 10% increase in Global Crossing's stock price. After the downside protection of approximately 30% was reached, the ratio stopped adjusting upward. Frontier also had a walk-away right and Global Crossing a "top-up" if the potential value of the deal was to fall below such point. Much later in the transaction, after Global Crossing stock in fact experienced a significant decline and had fallen through the entire downside layer, the parties decided to negotiate a revision of the transaction into a higher fixed ratio deal prior to the deal being voted upon by stockholders. This avoided the sometimes dysfunctional game of "chicken" that can occur at the end game of a "walk-away"/"top-up" negotiation, and provided much greater certainty to the companies' respective stockholders.

Although the vast majority of the transactions listed in the annexes hereto employ a straightforward, fixed ratio structure, in a volatile market or uncertain economy where it is difficult to secure financing and agree upon relative values, parties to M&A transactions increasingly may have to rethink ways to deliver value to stockholders. Fixed value transactions employing some of the value-protection mechanisms discussed above may provide an opportunity for a target to secure a minimum price for stockholders while preserving the flexibility that stock consideration provides purchasers in the current environment. Parties may also consider utilizing equity instruments other than stock such as contingent value rights (CVRs), which protect target stockholders from market risk once a transaction closes. In addition to the payment of cash and/or stock at closing, a purchaser utilizing the CVR structure would also issue target stockholders a security (the CVR) that would entitle the holder to receive a cash payment (or alternatively, additional shares of the purchaser) in the event that the price of the purchaser's shares does not meet a certain target or falls below a certain price at a specified future date. Although relatively rare, the advantages of the CVR are that a purchaser can promise fixed value to target stockholders but avoid excessive dilution at closing if the purchaser's stock has traded down from the time of signing and potentially avoid or postpone the payment of cash consideration. The disadvantage is that if the company underperforms following the acquisition, the purchaser must provide additional cash or suffer further dilution while saddled with an already depressed stock price.

Standalone Walk-Away Rights

Distinct from the collar-related walk-away rights discussed above are standalone walk-away rights found in some transactions. Such a provision may grant a seller without a price adjustment mechanism the right to terminate and walk away from the transaction if the purchaser's stock price declines below a certain percentage during a specified measuring period, thereby protecting the seller from excess diminution in value. In some fixed value/floating ratio agreements where there is no cap on the number of shares to be issued by the purchaser, a purchaser may try to protect itself from excessive dilution by negotiating a termination right if its stock price decreases below an agreed percentage during the measuring period, which would result in the issuance of an unacceptable number of shares. In this way, the walk-away right works as an alternative to having a cap in the number of shares to be issued. Some purchasers occasionally suggest a walk-away if their stock prices rise above specified thresholds, but these usually are met with significant resistance as an unsympathetic position. In any event, the required approval by a target's stockholders (and sometimes the purchaser's stockholders depending on the amount of newly issued stock) operates as a de facto walk-away right prior to the stockholder meeting.

An example of an agreement with this type of a purchaser's standalone walk-away is the Tyco/Millinckrodt transaction in 2000 which had an uncapped "fixed value" exchange ratio ($47.50 divided by the average stock price of Tyco), but permitted Tyco to terminate the transaction if the average price of Tyco stock was less than a floor price of $37 (or lower if Tyco at its discretion so agreed) and Millinckrodt had not delivered a notice to Tyco agreeing to fix the exchange ratio at $47.50 divided by the floor price.

Particular care should be taken when crafting a walk-away provision in a volatile market. Just as material adverse effect definitions in a merger agreement typically carve-out changes that result from general economic conditions, walk-away provisions may be a single trigger or a double trigger, such that the walk-away would only apply in the event of a decline that meets the percentage *over and above* the decline experienced by a negotiated basket of peer companies or other market indices.

Absolute walk-aways are quite unusual and from the standpoint of getting deals done, not as effective as carefully drafted adjustments that try to address the same problems through formulaic ratio changes, as opposed to brinksmanship. [9]

Interrelationship with Board of Directors Recommendations

Another factor that may implicitly create a quasi-walk-away right for the seller's board of directors is its fiduciary obligation arising under various state corporate law statutes to not recommend (or even recommend against) a transaction to the stockholders under circumstances which could include a substantial decline in the value of the transaction due to a decline in the purchaser's stock price. Depending upon the drafting of the section in a merger agreement giving the board the ability to modify its recommendation, a significant drop in the value of the purchaser's stock might give the board the ability to withdraw its recommendation, thus encouraging the stockholders to vote the transaction down. In one recent deal where there was a shareholder agreement containing a generally binding obligation for a significant shareholder to vote in favor of the transaction, the agreement released the shareholder from voting a portion of its stock if the board had changed its recommendation.

[9] A noteworthy development in 2009 was the increased use of "reverse termination" or "reverse break-up" fees beyond the ranks of private equity buyers. A number of prominent strategic transactions with a significant cash component have employed the reverse termination fee model to allocate financing risk between buyer and seller. The convergence of the strategic and private equity deal models with respect to financing risk in certain deals (most notably Mars/Wrigley in 2008 (all cash) and Pfizer/Wyeth and Merck/Schering-Plough in 2009) has introduced some of the typical private equity-deal concerns regarding optionality and closing certainty into the world of strategic transactions. Although the particular issues underlying the incorporation of reverse termination fee in a merger agreement are beyond the scope of this article, the risks to a seller of a reverse termination fee must be considered when negotiating the form of consideration in a strategic transaction. To date, the use of reverse termination fees in prominent strategic transactions has been generally tailored to the particular circumstances of each transaction without the "off-the-rack", precedent-based implementation characteristic of the private equity boom from 2005-2007. Whether strategic buyers increasingly seek to "commoditize" reverse deal protections on buyer-friendly terms or parties instead selectively employ the structure to address particular deal risks will be an issue to watch in 2010.

DRAFTING ISSUES WITH COLLARS, WALK-AWAY RIGHTS AND TOP-UP PROVISIONS

As a byproduct of including these types of provisions in a merger agreement, there are certain related important drafting issues that practitioners must keep in mind:

How do you define the price of purchaser's stock? The period over which the value is measured prior to closing (10 - 20 days is typical, and sometimes it is limited to random days in a selected period) and the mechanism of valuation (e.g., average closing price versus weighted average trading price) in order to prevent manipulation of value by traders are key negotiating points, but remember that the spot value at closing may not match the formulaic average price, particularly in a consistently rising or falling market.

How do you define the "closing date"? Collars and walk-away rights are not tested throughout the time period between signing and closing; they are typically only tested at the closing. Consequently, once the mechanism to determine the price of the purchaser's stock is determined, a time frame to determine when the collar, walk-away right or top up provision should be measured is required and when the closing actually occurs.

What is the timing of the actual walk-away mechanism? Typically a target has the right to terminate and walk away subject to a right to withdraw its termination notice within X hours and the purchaser has the right to tell the target whether it will elect to top-up within Y hours. The crucial issue in this mechanism is whether this time period will be the same or whether the target will have a longer period and then actually have the ultimate control whether to terminate the deal and walk away. If the time periods for the target to walk away and the purchaser to top up are the same, it can make this a game of "chicken". On the other hand, if the time period for the purchaser to elect to top up is shorter than the target's right of withdrawal, then the target might give a walk-away notice trying to induce a top up, and will ultimately withdraw the notice at the final hour unless the top-up occurs.

IMPLICATIONS OF WALK-AWAY RIGHTS ON FAIRNESS OPINIONS

Counsel to an Investment Bank Representing the Purchaser

In a fixed value transaction in which the investment bank will be required to provide a fairness opinion to the purchaser, there generally must either be a cap creating a maximum number of shares to be issued, or be a walkway right for the purchaser (which the opinion will assume is exercised), so that the investment bank can base its opinion on fixed assumptions as to prospective dilution. It would be very difficult for an investment bank to provide a fairness opinion without these protections, since in theory the purchaser could, in the worst-case scenario, have to issue an extremely high and unexpected percentage of its shares to the target (resulting in the target's stockholders potentially gaining control of the purchaser).

Counsel to an Investment Bank Representing the Target

In a transaction in which the investment bank will be required to provide a fairness opinion to the target and which contains a target walk-away right, the investment bank should always insist that the opinion contain an assumption that the walk-away right will be exercised. Providing this assumption in the opinion protects the investment bank in the event that the target elects not to exercise its walk-away right and does the deal at a lower value. In such event, the target would be required to come back to the investment bank and request that the bank reevaluate the fairness of the transaction (or forgo an opinion), rather than being able to rely upon the existing opinion (which the target might try to do in the absence of this assumption, depending upon the other protective wording of the opinion).

R.E.S.

SIMPSON THACHER & BARTLETT LLP

Annex A

Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2004

	Acquiror	Target	Deal Value ($ mill)[10]	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
1.	JP Morgan Chase & Co.	Bank One Corporation	58,760.6	1/14/04	Common Stock	--	Yes	No	None	No
2.	Sprint Corporation	Nextel Communications, Inc.	38,975.1	12/15/04	Common stock and cash	Unit	Yes	No	None	No
3.	Johnson & Johnson	Guidant Corporation [11]	25,856.3	12/15/04	Common stock and cash	Unit	No	Yes	Yes	No
4.	Wachovia Corp.	South Trust Corp.	14,155.8	6/21/04	Common stock	--	Yes	No	None	No
5.	Symantec Corporation	Veritas Software Corporation	13,519.7	12/16/04	Common stock	--	Yes	No	None	No
6.	Exelon Corporation	Public Service Enterprise Group Incorporated	12,293.6	12/20/04	Common stock	--	Yes	No	None	No
7.	Kmart Holding Corporation	Sears, Roebuck and Co.	10,901.3	11/17/04	Common stock or cash	Election, pro rata	Yes	No	None	No
8.	SunTrust Banks, Inc.	National Commerce	7,025.1	5/09/04	Common stock or cash	Election, equalizer	Yes	No	None	No

[10] The deal value for substantially all of the transactions contained in this and the following annexes was obtained from Thomson One.

[11] On April 21, 2006, Boston Scientific successfully completed its deal jump of Johnson & Johnson's proposed transaction. Boston Scientific's acquisition of Guidant used a similar common stock and cash fixed value structure, with an aggregate deal value of approximately $27.2 billion.

	Acquiror	Target	Deal Value ($ mill)[10]	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
		Financial Corporation								
9.	Harrah's Entertainment, Inc.	Caesars Entertainment, Inc.	6,332.3	7/15/04	Common stock or cash	Election, pro rata	Yes	No	None	No
10.	North Fork Bancorporation, Inc.	Greenpoint Financial Corp.	6,270.2	2/16/04	Common stock	--	Yes	No	None	No
11.	Regions Financial Corporation	Union Planters Corporation	5,846.1	1/23/04	Common stock	--	Yes	No	None	No
12.	UnitedHealth Group Incorporated	Oxford Health Plans, Inc.	4,961.2	4/26/04	Common stock and cash	Unit	Yes	No	None	No
13.	Simon Property Group, Inc.	Chelsea Property Group, Inc.	4,861.1	6/21/04	Common stock, preferred stock, and cash	Unit	Yes	No	Yes	No
14.	Juniper Networks, Inc.	NetScreen Technologies, Inc.	4,173.4	2/6/04	Common stock	--	Yes	No	None	No
15.	Mylan Laboratories Inc.	King Pharmaceuticals, Inc.	4,026.6	7/26/04	Common stock	--	Yes	No	None	No

Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2005

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
1.	Proctor & Gamble Co.	Gillette Co.	54,906.8	1/27/05	Common stock	--	Yes	No	None	No
2.	Bank of America Corp.	MBNA Corp.	35,810.3	6/30/05	Common stock and cash	Unit	Yes	No	None	No
3.	ConocoPhillips	Burlington Resources Inc.	35,600.0	12/12/05	Common stock and cash	Unit	Yes	No	None	No
4.	ChevronTexaco Corporation	Unocal Corp.	18,718.5	4/4/05	Common stock or cash	Election, pro rata	Yes	No	None	No
5.	Federated Department Stores Inc.	May Department Stores Co.	16,465.9	2/27/05	Common stock and cash	Unit	Yes	No	None[12]	No
6.	SBC Communications Inc.	AT&T Corp	14,732.6	1/30/05	Common stock	--	Yes	No	None	No
7.	Pernod Ricard S.A.	Allied Domecq PLC	14,414.1	4/21/05	Common stock and cash	Unit[13]	Yes	No	None	No

12 The agreement contained provisions allowing the acquiror to increase the fixed ratio, essentially acting as a bottom collar, to ensure the transaction would qualify as a “reorganization” for tax purposes or otherwise increase the cash consideration by $1.00 per share.

13 Although the consideration was structured using the “unit” mechanic, the deal provided stockholders the right to make a “Mix and Match Election,” whereby the stockholder was able to elect to alter the mix of cash and stock consideration to be used (i.e., for every 125 pence in cash, the stockholder would receive an addition 0.0158 shares of common stock, subject to pro ration).

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
8.	MetLife Inc.	Citigroup Inc.'s Travelers Life & Annuity Co. and international insurance business	11,694.7	1/31/05	Common stock and cash	Unit	No	Yes	Yes	Yes
9.	Inco Ltd.	Falconbridge Ltd.	10,968.6	10/11/05	Common stock or cash	Election, pro rata	Yes	No	Yes	No
10	Barrick Gold Corporation	Placer Dome Inc.	10,400.0	12/22/05	Common stock or cash	Election, pro rata	Yes	No	None	No
11.	R.H. Donnelley Corporation	Dex Media, Inc.	9,449.4	10/3/05	Common stock and cash	Unit	Yes	No	None	No
12.	Valor Communications Group Inc.	ALLTEL Corporation's Wireline Business	9,096.0	12/9/05	Common stock	--	Yes	No	None	No
13.	Duke Energy Corp.	Cinergy Corp.	8,832.9	5/9/05	Common stock	--	Yes	No	None	No
14.	Valero Energy Corp.	Premcor Inc.	8,521.6	4/24/05	Common stock or cash	Election, pro rata	Yes	No	None	No
15.	Verizon Communications Inc.	MCI Inc.	8,495.6	2/14/05	Common stock and cash[14]	Unit	Yes	No	Yes	No
16.	NRG Energy, Inc.	Texas Genco LLC	8,325.0	9/30/05	Common stock and cash[15]	Unit	No	Yes	Yes	No

14 The cash portion of the consideration was subject to downward adjustment for certain liabilities, including bankruptcy and tax claims. In the event such adjustment brought the cash consideration to zero, the fixed ratio would have been adjusted.

15 The agreement allowed NRG Energy, Inc. to pay a portion of the consideration in cash and a minimum number of shares of common stock and elect to pay the remaining consideration in additional shares of common stock, additional cash, shares of a new series of preferred stock or a combination of the foregoing.

Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2006

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
1.	AT&T Inc.	BellSouth Corp.	72,671.0	3/5/06	Common stock	--	Yes	No	None	No
2.	Mittal Steel Co NV	Arcelor SA	32,240.5	6/25/06	Common stock or cash	Election, pro rata[16]	Yes	No	None	No
3.	Freeport-McMoRan Copper & Gold	Phelps Dodge Corp.	25,833.7	11/19/06	Common stock and cash	Unit	Yes	No	None	No
4.	Wachovia Corp.	Golden West Financial Corp	25,500.9	5/7/06	Common stock and cash	Unit	Yes	No	None	No
5.	CVS Corp.	Caremark RX Inc.	22,981.1	11/1/06	Common stock	--	Yes	No	None	No
6.	Investor Group[17]	Albertson's	17,073.8	1/22/06	Common stock and cash	Unit	Yes	No	None	No
7.	Bank of New York	Mellon Financial	15,679.6	12/4/06	Common Stock[18]	--	Yes	No	None	No
8.	Capital One	North Fork	15,132.9	3/12/06	Common stock	Election,	Yes	No	None	No

[16] The Arcelor shareholders were entitled to tender their shares in either the "primary offer" or the "secondary offer." The primary offer consisted of a unit of cash and stock for Arcelor shares, while in the secondary offer, the Arcelor shareholders could elect between stock and cash, with stock comprising 75% of the consideration in the secondary offer and cash 25% of the consideration.

[17] Investor Group included Supervalu Inc., CVS Corporation and a consortium of investors including Cerberus Capital Management, L.P., Kimco Realty Corporation, Lubert-Adler Management, Inc., Klaff Realty, LP, and Schottenstein Stores Corporation. The consideration described above related to the consideration received by Albertson's shareholders in the initial Albertson's/Supervalu merger.

[18] Bank of New York's shareholders received 0.9434 shares of the combined entity for each Bank of New York share. Mellon's shareholders exchanged their stock on a one-for-one basis.

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
	Financial	Bancorp			or cash	equalizer				
9.	Alcatel SA	Lucent Technologies	13,591.2	3/24/06	Common Stock	--	Yes	No	None	No
10.	Thermo Electron	Fisher Scientific	10,291.8	5/8/06	Common stock	--	Yes	No	None	No
11.	NYSE Group	Euronext SA	10,203.4	5/22/06	Common stock and cash	Unit[19]	Yes	No	None	No
12.	Regions Financial	AmSouth Bancorp	10,020.8	5/25/06	Common Stock	--	Yes	No	None	No
13.	CBOT Holdings	Chicago Mercantile Exchange	8,007.1	10/17/06	Common stock or cash	Election, equalizer	Yes	No	None	No
14.	Mercantile Bankshares	PNC Financial Services	5,981.8	10/9/06	Common stock and cash	Unit	Yes	No	None	No

[19] Although the consideration was structured using the "unit" mechanic, the deal provided stockholders the right to make a "Mix and Match Election," whereby the stockholder was able to elect to alter the mix of cash and stock consideration to be used, subject to proration.

Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2007

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
1.	BHP Billiton Ltd.	Rio Tinto PLC	189,751.94	11/08/07[20]	Common Stock[21]	--	Yes	No	None	No
2.	RFS Holdings BV[22]	ABN AMRO Holding NV	99,364.81	4/25/07	Common stock and cash	Unit	Yes	No	None	No
3.	Unicredito Italiano SpA	Capitalia SpA	29,528.09	5/15/07	Common Stock	--	Yes	No	None	No
4.	Thomson Corp.	Reuters Group PLC	17,628.12	5/07/07	Common stock and cash	Unit	Yes	No	None	No
5.	Transocean Inc.	GlobalSantaFe Corp.	17,298.66	7/23/07	Common stock and cash	Unit	Yes	No	None	No
6.	BBVA SA	Compass Bancshares Inc.	9,870.56	2/16/07	Common stock or cash	Election, pro rata	Yes	No	None	No

[20] On November 8, 2007, BHP Billiton made an informal proposal for Rio Tinto, offering three of its shares for every one Rio Tinto share (subsequently formalized and increased to 3.4 BHP shares for each Rio Tinto share in February 2008), which initially valued Rio Tinto on an equity basis at approximately $140 billion and which Rio Tinto immediately rejected. On November 25, 2008, BHP Billiton abandoned its hostile bid to acquire Rio Tinto, at which time the revised offer was worth only $66 billion after a steep decline in BHP's share price. BHP explained that turmoil in financial markets, uncertainty about the global economic outlook and regulatory concerns in Europe meant the deal was no longer in its shareholders' best interest.

[21] BHP's offer contemplated a share buy-back on completion of the merger aimed largely at Rio Tinto's London-listed shares, which would have effectively introduced a cash-component for Rio Tinto's shareholders in the transaction.

[22] A new company formed by Royal Bank of Scotland Group PLC, Fortis Group NV and Santander Central Hispano SA in connection with the consortium's acquisition of ABN AMRO. The stock component of the transaction consisted of Royal Bank of Scotland ordinary shares.

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
7.	Ingersoll-Rand Co. Ltd.	Trane Inc.	9,750.75	12/17/07	Common stock and cash	Unit	Yes	No	None	No
8.	Toronto-Dominion Bank	Commerce Bancorp	8,638.21	10/02/07	Common stock and cash	Unit	Yes	No	None	No
9.	National Oilwell Varco Inc.	Grant PrideCo Inc.	7,513.45	12/17/07	Common stock and cash	Unit	Yes	No	None	No
10.	Wachovia Corp.	AG Edwards Inc.	6,944.36	5/31/07	Common stock and cash	Unit	Yes	No	None	No
11.	Marathon Oil Corp.	Western Oil Sands Inc.	6,185.32	7/31/07	Common stock or cash	Election, pro rata	Yes	No	None	No
12.	News Corp.	Dow Jones & Co. Inc.	5,109.65	5/01/07	Common stock or cash	Election, pro rata[23]	No	Yes	None	No
13.	Vulcan Materials Co.	Florida Rock Industries Inc.	4,658.67	2/19/07	Common stock or cash	Election, pro rata	Yes	No	None	No
14.	State Street Corp.	Investors Financial Services Corp.	4,533.04	2/05/07	Common Stock	--	Yes	No	None	No

[23] Dow Jones shareholders were given the option to exchange their shares on a tax-free basis for non-trading class B units of a newly formed News Corp. subsidiary ("Newco"), which shares are then ultimately convertible into News Corp. common stock. The News Corp./Dow Jones election structure was unusual in that it limited not only the aggregate number of shares that could elect unit consideration (approximately 10% of outstanding Dow Jones shares subject to typical proration) but also the number of actual stockholders who could make that election (no more than 250 stockholders, determined by giving priority to the 250 stockholders who made elections for the greatest number of units). According to the proxy statement, the limitation on number of stockholders allowed to make a unit election addressed News Corp.'s desire to ensure that there would be fewer than 300 record holders of Newco units so that Newco would not become an SEC filer.

Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2008

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
1.	Bank of America Corp.	Merrill Lynch & Co. Inc.	48,766.15	9/14/08	Common Stock	--	Yes	No	None	No
2.	Microsoft Corp.	Yahoo! Inc.	43,711.60	2/01/08[24]	Common stock or cash	Election, pro rata	Yes	No	None	No
3.	Lloyds TSB Group PLC	HBOS PLC	25,439.45	9/17/08	Common Stock	--	Yes[25]	No	None	No
4.	Wells Fargo & Co.	Wachovia Corp.	15,111.99	10/03/08	Common Stock	--	Yes	No	None	No
5.	Teck Cominco Ltd.	Fording Canadian Coal Trust	13,599.13	7/29/08	Common stock and cash	Unit	Yes	No	None	No
6.	CenturyTel, Inc.	Embarq Corp.	11,559.41	10/27/08	Common Stock	--	Yes	No	None	No
7.	Cleveland-Cliffs	Alpha Natural	9,089.25	7/16/08[26]	Common stock	Unit	Yes	No	None	No

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24 On February 1, 2008, Microsoft made an unsolicited, $44.6 billion cash and stock bid for Yahoo!. The offer represented a 62 percent premium above the closing price of Yahoo! common stock on January 31, 2008. On May 3, 2008, Microsoft withdrew its bid, after having previously increased its offer by $5 billion, which was still rejected by Yahoo! as too low. Microsoft had threatened to pursue a hostile takeover if it could not come to an agreement with Yahoo! management. The information reflected in the above chart is based on information from Microsoft's initial letter to the board of directors of Yahoo! setting forth its proposal, which was included in Microsoft's press release issued on February 1, 2008.

25 The original agreement provided that HBOS shareholders would receive 0.833 LloydsTSB share for every 1 HBOS share. However, as a result of a recapitalization of the UK retail banking sector by the British government and the extraordinary deterioration in the overall UK banking sector, the parties agreed on October 13, 2008 to amend the merger ratio for the acquisition such that HBOS shareholders will receive 0.605 LloydsTSB share for every 1 HBOS share.

26 On November 18, 2008, the companies terminated their merger agreement, with Cleveland Natural Resources (f/k/a Cleveland-Cliffs) agreeing to pay Alpha Natural Resources $70m as a termination fee ($30 million less than their agreement required). The friendly deal ran into trouble shortly

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
	Inc.	Resources Inc.			and cash					
8.	Teva Pharmaceutical Industries	Barr Pharmaceutical Inc.	8,810.21	7/18/08	Common stock and cash	Unit	Yes	No	None	No
9.	CME Group Inc.	NYMEX Holdings Inc.	7,555.37	1/28/08	Common stock or cash	Election, equalizer	Yes	No	None	No
10.	Invitrogen Corp	Applied Biosystems Group	6,683.46	6/10/08	Common stock or cash or combination	Election, pro rata	Yes	No[27]	None	No
11.	Exelon Corp.	NRG Energy Inc.[28]	6,260.76	10/19/08	Common Stock	--	Yes	No	None	No

after it was announced when Cleveland Natural Resources' largest shareholder, Harbinger Capital Management, announced that it opposed the transaction.

27 While this transaction was structured as an election between a fixed ratio of 0.8261 shares of Invitrogen common stock, $38.00 in cash and a unit combination of cash and Invitrogen common stock, subject to proration, there was a limited amount of pre-closing price protection for Applied Biosystems' stockholders on their portion of merger consideration comprising Invitrogen common stock. This price protection essentially functioned as a pre-closing contingent value right, which would compensate Applied Biosystems' stockholders who elected (or received through proration) shares of Invitrogen common stock with additional consideration per Applied Biosystems share of up to the product of $2.31 multiplied by the portion of a share of Invitrogen common stock which such holder had a right to receive, but only if the volume-weighted average price of Invitrogen common stock on each trading day during the 20 consecutive trading days immediately preceding the third business day prior to the closing date was less than $46.00 per share (the value of a share of Invitrogen common stock implied by both the fixed ratio and cash election options on the signing date). Beyond this narrow range of downside price protection for Applied Biosystems' stockholders, the agreement included no adjustment on the upside if Invitrogen shares traded above $46.00 and no additional adjustment on the downside if Invitrogen shares traded below $43.69 (the "CVR" floor), including no walk-away right.

28 On November 11, 2008, two days after NRG rejected Exelon's then $6.2 billion unsolicited offer, Exelon launched an exchange offer for all the outstanding shares of NRG at a fixed exchange ratio of 0.485 Exelon shares for each NRG share. Exelon's offer represented a 37 percent premium over NRG's closing price before the proposal was announced in October 2008. On January 7, 2009, Exelon announced that NRG shareholders had tendered 106.3 million shares, representing 45.6 percent of the company's outstanding common stock, and that Exelon would extend its offer to

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
12.	Republic Services Inc.	Allied Waste Industries Inc.[29]	6,113.97	6/23/08	Common Stock	--	Yes	No	None	No
13.	PNC Financial Services Group	National City Corp.	5,617.67	10/24/08	Common stock	--	Yes	No	None	No
14.	Bank of America Corp.	Countrywide Financial Corp.	4,143.85	1/11/08	Common Stock	--	Yes	No	None	No
15.	Ashland Inc.	Hercules Inc.	3,323.25	7/11/08	Common stock and cash	Unit	Yes	No	None	No
16.	Delta Air Lines Inc.	Northwest Airlines Inc.	2,958.29	4/14/08	Common Stock	--	Yes	No	None	No

February 25, 2009. Even though more than a majority of the NRG shareholders conditionally accepted Exelon's offer at the end of February, the offer was further extended. Exelon ultimately increased its bid to .545 Exelon shares for each NRG share, but notwithstanding such increase the NRG shareholders voted against the Exelon sponsored board nominees for election to the NRG board in late July. Thereafter, Exelon formally abandoned its hostile bid.

[29] Following the announcement of Republic Services' agreement to purchase Allied Waste, Waste Management initiated an unsolicited takeover attempt of Republic Services (with its offer subsequently increased), which was rejected by Republic and its largest stockholder, Bill Gates, through his investment vehicle Cascade Investment LLC, as an attempt to derail the Republic-Allied transaction. Waste Management abandoned its effort to acquire Republic on October 13, 2008, and the Republic/Allied transaction closed on December 5, 2008.

Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2009/2010

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
1.	Pfizer Inc.	Wyeth	67,285.70	01/26/09	Common stock and cash	Unit	Yes	No	No[30]	No
2.	Exxon Mobil Corp.	XTO Energy Inc.	40,298.14	12/14/09	Common stock	--	Yes	No	No	No
3.	Merck & Co. Inc.	Schering-Plough Corp.	38,406.36	03/09/09	Common stock and cash	Unit	Yes	No	No	No
4.	Berkshire Hathaway Inc.	Burlington Northern Santa Fe	36,724.00[31]	11/03/09	Common stock or cash	Election, pro rata[32]	No	Yes	Yes	No

[30] In the event that common stock issued by Pfizer would have exceeded 19.9% of the outstanding shares of common stock of Pfizer immediately prior to the effective time of the merger, the stock portion of the merger consideration would have been reduced to the minimum extent necessary so that the number of shares of Pfizer common stock issued as a result of the merger would have equaled no more than 19.9% of its outstanding common stock and the cash portion of the merger consideration would have been increased by an equivalent value.

[31] The $36 billion transaction value represents the value of consideration to be paid to non-Berkshire holders of Burlington Northern stock (approximately $26 billion) and the assumption of Burlington Northern debt (approximately $10 billion). Including Berkshire's 23% existing stake, the total deal value is approximately $44 billion.

[32] The cash and stock elections that Burlington Northern stockholders make with respect to their shares may be subject to proration and reallocation to achieve a 60/40 cash-stock split.

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
5.	Kraft Foods Inc.	Cadbury PLC	18,769.00	09/07/09	Common stock and cash	Election, pro rata[33]	Yes	No	No	No
6.	Suncor Energy Inc.	Petro-Canada	15,581.71	03/23/09	Common stock	--	Yes	No	No	No
7.	DirecTV Group Inc.	Liberty Entertainment Inc.	15,243.05	05/04/09	Common stock	--	Yes	No	No	No
8.	Xerox Corp.	Affiliated Computer Services Inc.	8,374.20[34]	09/28/09	Common stock and cash	Unit	Yes	No	No	No
9.	Agrium Inc.	CF Industries Holdings Inc.	5,597.30	02/25/09	Common stock and/or cash	Election, pro rata[35]	Yes	No	No	No
10.	PepsiCo Inc.	Pepsi Bottling Group Inc.	5,421.63	04/20/09	Common stock or cash	Election, pro rata	Yes	No	No	No

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[33] Although the unit form of consideration in the tender offer is the default consideration available to Cadbury shareholders, Cadbury shareholders tendering into the offer may elect to mix and match the cash and stock portions of the consideration under a mix and match facility. On January 19, 2010, the board of directors of Cadbury unanimously agreed to recommend that Cadbury shareholders accept the terms of a revised, final offer from Kraft. Cadbury had previously resisted Kraft's takeover bid since the offer was made public in September 2009.

[34] Part of the deal value includes approximately $2 billion in debt that Xerox will assume under the agreement.

[35] At this date, Agrium is continuing its long-running attempted hostile takeover of CF Industries through an exchange offer (followed by a second step merger). The exchange offer allows shareholders to elect to receive cash consideration or stock consideration subject to proration to ensure that no more than 47% of the shares tendered are exchanged for cash and no more than 53% of the shares tendered are exchanged for Agrium common shares.

	Acquiror	Target	Deal Value ($ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/ Collar	Walk-away
11.	Baker Hughes Inc.	BJ Services Co.	5,240.49	08/31/09	Common stock and cash	Unit	Yes	No	No	No
12.	Walt Disney Co.	Marvel Entertainment Inc.	3,958.35	08/31/09	Common stock and cash	Unit	Yes[36]	No	No	No
13.	Stanley Works	Black & Decker Corp.	3,469.75	11/02/09	Common stock	--	Yes	No	No	No
14.	Pulte Homes Inc.	Centex Corporation	3,105.76	04/09/09	Common stock	--	Yes			
15.	Fidelity National Information Services Inc.	Metavante Technologies Inc.	2,978.30	04/01/09	Common stock	--	Yes	No	No	No
16.	Tyco International Ltd.	Brink's Home Security Holdings, Inc.	1,946.58	01/18/2010	Common stock and/or cash	Election, pro rata[37]	No	Yes	Yes	No

[36] Marvel stockholders are entitled to receive (i) $30.00 in cash and (ii) 0.7452 shares of Disney common stock for each share of Marvel common stock. However, the fixed exchange ratio may be revised to ensure that the aggregate stock consideration is no less than 40% of the total deal consideration payable at closing, in which case the exchange ratio would be increased, and the amount of cash paid per share of Marvel common stock would be correspondingly decreased, until the total stock consideration equals 40% of the aggregate merger consideration.

[37] The deal provides that the stock election is unlimited, but the cash election has a cap of approximately 30% of the total merger consideration and is subject to proration to achieve the 30% limitation. In addition, Brink's stockholders can elect to receive a combination of cash and stock, which will be blended to provide for approximately 30% cash.