

## Selected Legal Issues Relating to the Selection and Implementation of Differing Forms of Consideration in M&A Transactions

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**March 4, 2016**

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# Selected Legal Issues Relating to the Selection and Implementation of Differing Forms of Consideration in M&A Transactions

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, in consultation with 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. Typically, these factors are also inextricably linked to general economic conditions and the broader deal making environment, as was again the case in 2015. 2015 saw the strongest annual period for M&A activity on record, with transactional activity up 32% from the already elevated levels seen in 2014. Data from Thomson Reuters<sup>1</sup> indicates worldwide M&A transactions totaled \$4.7 trillion, including 71 “mega deals” with a value greater than \$10 billion. Overall, over 42,000 worldwide deals were announced during 2015, a 0.2% increase compared to 2014. The United States was a driving force behind this activity, with transactions totaling \$2.3 trillion during 2015, an increase of 64% compared to the level of activity seen during 2014.

Since the extreme market turmoil seen in 2008 and 2009, there have been intermittent surges in deal activity, but 2014 saw the beginning of what can be considered the first M&A boom since the “Great Recession,” as investors and strategic buyers regained their long awaited confidence to execute on large and transformative transactions.<sup>2</sup> The record breaking activity in 2015 was likely encouraged by factors similar to those present in 2014: a stable United State stock market, continued low interest rates (with the widely expected rise in interest rates in December – the first increase since 2006 – potentially encouraging acquirors to act in the event interest rates go higher) and large reserves of cash on corporate balance sheets. However, sluggish global economic growth (including the deceleration of the Chinese economy from its previous breakneck pace) may have also played a factor as companies sought to replace organic growth by means of acquisitions. The healthcare sector led the way with transactions totaling \$672.9 billion during 2015, an increase of 71% compared to 2014 levels.<sup>3</sup> Oil and gas prices continued to remain at low levels compared to recent historical trends, spurring heavy M&A activity in that sector. Although borrowing rates are low and many public companies have large amounts of cash on their balance sheets, the use of stock as part of acquisition consideration remained extremely attractive to many acquirors in strategic transactions given the high prevailing level of stock prices, and remained a way for buyers to bridge value gaps with sellers, particularly in a market such as existed during at least the early part of 2015, when acquirors were generally rewarded for announcing transactions (allowing the use of stock as part of a fixed ratio consideration to result in an extra premium to target sellers at closing). That trend trailed off in mid-2015 when the markets began to take a more critical view of acquisitions, and buyers can no longer count on a buy-side stock price bump (but nor should they assume a merger announcement price drop as was the case a few years ago). Targets and acquirors alike remain well-advised to consider a number of factors when negotiating transactions in which stock comprises some or all of the consideration to be paid.

<sup>1</sup> See, <http://www.hitc.com/en-gb/2016/01/06/ma-review-full-year-2015-thomson-reuters>.

<sup>2</sup> See, generally, <http://www.ft.com/intl/cms/s/0/0fd15156-9e5b-11e5-b45d-4812f209f861.html#axzz3xhtdTo1K> and <http://www.ft.com/fastft/2015/06/24/global-mand-activity>. See, <http://www.bloomberg.com/news/articles/2016-01-05/2015-was-best-ever-year-for-m-a-this-year-looks-pretty-good-too>.

<sup>3</sup> See, <http://www.nytimes.com/2015/10/30/business/dealbook/health-care-companies-in-merger-frenzy.html>.

In a relatively stable market, the use of stock as deal consideration provides a prospective purchaser with transaction currency and allows target stockholders the opportunity to participate in potential upside. Relatively reduced market volatility overall since the upheavals in 2008 and 2009 have helped stock become a more attractive form of consideration for buyers and sellers alike, both to address possible absolute and relative valuation issues and to minimize deal risks that arise in transactions where all or part of the cash component relies on debt financing. However, 2015 saw ongoing reminders that systemic risk is inescapable, with the collapse in the Chinese equity markets in the second half of the year and the reappearance of long simmering issues in Europe, including Greece defaulting on IMF obligations in June. It will remain to be seen whether the pace of M&A activity seen in 2015 can continue through 2016 amid rising uncertainty over the strength of the economy both in the U.S. and globally, and the tightening of debt markets – particularly for private equity transactions – being felt at the end of 2015 and beginning of 2016. 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 all or part of 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 L contain charts outlining the key attributes of selected transactions including stock or mixed consideration announced from 2004 through the end of 2015.

## 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 transactions in each of the years 2009 through 2015, listed in Annexes D through L (although 2015 saw an increase in the election structure, with six transactions listed in Annex L). This unit structure was notably used in the largest transactions of 2007 (the acquisition of ABN AMRO by Royal Bank of Scotland, Fortis and Banco Santander), 2009 (the acquisition of Wyeth by Pfizer), 2011 (the acquisition of Medco Health Solutions by Express Scripts) and 2014 (the acquisition of Allergan by Actavis PLC). 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's successful deal jump of that transaction and J&J's transaction terms in its acquisition of Synthes for an estimated \$22.7 billion, as set forth in Annex H, used essentially the same collared "fixed value" unit structure. As discussed later in this article, fixed value methods of determining the stock value of a transaction are significantly less common than the fixed ratio method.
- The other primary option is an election structure where stockholders of the target may choose between the two forms of consideration (or some combination thereof), 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 prominent examples of this structure are: Pfizer's 2015 combination with Allergan, set forth in Annex L, which is structured as an acquisition of Pfizer by Allergan, in which Pfizer stockholders will have the right to elect to receive as merger consideration one share of

common stock of Allergan or a cash amount equal to the volume weighted average trading price of Pfizer common stock on the day before closing, subject to proration to ensure that the aggregate cash consideration paid in the merger is not less than \$6 billion and does not exceed \$12 billion; Charter's 2015 acquisition of Time Warner Cable, set forth in Annex L, in which Time Warner shareholders have the right to elect to receive for each Time Warner share (i) \$100.00 in cash and a number of shares of a newly formed holding company ("New Charter") equal to 0.5409 multiplied by the "Parent Merger Exchange Ratio" (which is equal to 0.9042) or (ii) \$115.00 in cash and a number of New Charter shares equal to 0.4562 multiplied by the Parent Merger Exchange Ratio; Avago's 2015 acquisition of Broadcom Energy, set forth in Annex L, in which Broadcom shareholders have the right to elect to receive: (i) \$54.50 in cash; (ii) 0.4378 ordinary shares of a newly formed "Holdco" holding company; or (iii) either 0.4378 units of a newly formed limited partnership or 0.4378 restricted shares in Holdco (with restricted shares to be issued in the event an IRS ruling is obtained and units to be issued otherwise), with the elections in (i) and (ii) above subject to proration; Energy Transfer's 2015 acquisition of The Williams Companies, Inc., set forth in Annex L, whereby Williams' stockholders have the right to elect to receive as merger consideration (i) 1.8716 shares of a newly formed "TopCo" holding company, with each share having attached to it one contingent consideration right, (ii) \$8.00 in cash and 1.5274 shares of TopCo, with each share having attached to it one contingent consideration right which or (iii) \$43.50 in cash, subject to proration to ensure that the aggregate cash consideration does not exceed an amount equal to the product of the total number of Williams shares outstanding at the closing multiplied by \$8; Actavis PLC's 2014 acquisition of Forest Laboratories Inc., set forth in Annex K, in which Forest Laboratories Inc. stockholders who elect to receive all stock or all cash are subject to proration in order to ensure that the total amount of cash paid and number of Actavis shares issued as a whole are equal to the total amount of cash and number of Actavis shares that would have been paid and issued if each Forest shareholder received a combination of \$26.04 in cash plus 0.3306 Actavis ordinary shares for each Forest share held; American Realty Capital Properties, Inc.'s 2013 acquisition of Cole Real Estate Investments, Inc., set forth in Annex J, in which elections by shareholders of the target were subject to the aggregate consideration paid in cash not being paid on more than 20% of the shares of the target issued and outstanding at closing, with cash consideration to be reduced on a pro rata basis and the remainder of the consideration to be paid in American Realty Capital Properties, Inc. common stock; IntercontinentalExchange, Inc.'s acquisition of NYSE Euronext, which closed in November 2013 and is set forth in Annex I, in which the stock and cash elections of NYSE Euronext stockholders are subject to proration such that the overall mix of consideration would comprise 33% cash and 67% stock; Kinder Morgan's 2011 acquisition of El Paso, set forth in Annex H, where the cash and stock elections of El Paso stockholders were subject to proration to achieve a 57/43 cash-stock split (excluding warrants); Ecolab Inc.'s 2011 acquisition of Nalco Holding Company, set forth in Annex H, in which the stock and cash elections of Nalco stockholders were subject to proration and reallocation in order to achieve a 30/70 cash-stock split; Tyco International's 2010 acquisition of Brink's Home Security Holdings, set forth in Annex G, in which stock elections were uncapped but cash elections were subject to proration and limited to approximately 30% of total merger consideration; Berkshire Hathaway's 2009 acquisition of Burlington Northern Santa Fe, set forth in Annex F, in which the cash and stock elections of Burlington Northern Santa Fe stockholders were subject to proration and reallocation in order to achieve a 60/40 cash-stock split; and 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.

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, a significant number of the 2005 transactions set forth in Annex B, the 2004 Harrahs/Caesars and Kmart/Sears transactions set forth in Annex A, and all of the election transactions from 2007 to 2015 (set forth in Annexes D through L, respectively), used this form (with the exceptions of News Corp./Dow Jones, Berkshire Hathaway/Burlington Northern, Tyco International/Brink's, Priceline/KAYAK and American Realty Capital Properties, Inc./American Realty Capital Trust IV, Inc.). In addition, the 2012 Freeport-McMoRan/Plains Exploration deal described in Annex I notably employs a type of hybrid election structure that permits shareholders to choose between a "fixed ratio" plus stock base unit, or a prorated cash or stock election having an equalized value determined to be equal to the base unit (the value of which in part is fixed and part itself floats). The combination of the election process with a "fixed ratio" structure is potentially less "effective," and was historically less typical, as a pure choice of form (although as noted above, most transactions with an election mechanism have been 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 in any event! (Interestingly, in the 2010 Tyco/Brink's deal, set forth at Annex G, the 2014 Actavis/Forest Laboratories deal, set forth at Annex K, and the 2015 Energy Transfer/The Williams Companies deal, set forth at Annex L, 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.

Although typically an election mechanism allows a target's shareholders to choose between cash or stock consideration, in rare instances the shoe is on the other foot and an acquiror is given the ability to modify the consideration mix post-signing.<sup>4</sup> The 2013 acquisition of Lender Processing Services, Inc. by Fidelity National Financial Inc., set forth in Annex J, employed this structure. Fidelity National Financial Inc. was given the right to elect to alter the consideration mix by increasing the cash consideration (and reducing the number of shares to be issued) if it was able to secure additional financing or obtained additional cash between signing and closing. Another transaction, announced in 2013, that allowed the acquiror to modify the consideration mix after signing was American Realty Capital Properties, Inc.'s acquisition of American Realty Capital Trust IV, Inc. In this transaction, shareholders of the target were entitled to elect between receiving either (i) \$30 in cash per share of the target (provided that in no event would the aggregate consideration paid in cash be paid on more than 25% of the shares of the target issued and outstanding immediately prior to the merger; any higher number of shares electing to receive cash were subject to receiving the stock consideration on a pro-rated basis) and (ii) stock. If shareholders of the target elected to receive stock, the number of shares of the acquiror to be issued for each share of the target varies depending on the volume weighted average closing price of the acquiror's common stock over the five consecutive trading days preceding the closing of the merger (the "Market Price"). If the Market Price was \$14.94 or greater, then the shareholders of the target were entitled to receive 2.05 shares of the acquiror for each share held in the target. If the Market Price was below \$14.94, then the consideration to be paid

<sup>4</sup> These types of acquiror-driven economic elections are in addition to the circumstances where the acquiror may have an election or a mandatory cash-stock substitution provision in order to keep the percentage of the stock issued in the transaction below the threshold that would trigger either an acquiror shareholder vote or have a regulatory adverse effect. See the examples described in footnote 13, below.

was subject to the acquiror's discretion to introduce more cash or not: the acquiror could elect to pay either (a) 2.05 shares of the acquiror plus an additional cash amount per share of the target sufficient to represent a total value per share of the target of \$30.62 or (b) sufficient shares of the acquiror in exchange to represent a value per share of the target of \$30.62. The PNC Financial Services Group/RBC Bank (USA) transaction announced on June 20, 2011, as set forth in Annex H, provided PNC, the buyer, with the option to pay up to \$1 billion of the purchase price using its common stock (based on the volume-weighted average trading price of PNC common stock for each of the last 10 trading days immediately preceding the closing date), with the remainder of the purchase price to be paid in cash. While PNC's CEO has explained that banking regulations surrounding capital requirements influenced this unusual transaction structure, the option to determine the cash-stock mix prior to closing provided PNC the ability to select the ideal consideration mix among a spectrum of options based on its share price prior to closing and the impact of utilizing some amount of shares as consideration on its pro forma earnings per share and overall capital structure. Similarly, in the terminated 2011 AT&T/T-Mobile transaction, as set forth in Annex H, AT&T had the right to increase the cash portion of the purchase price by up to \$4.2 billion with a corresponding reduction in the stock component of the purchase price based on the volume-weighted average price of AT&T common stock during the 30 trading days ending on the third business day prior to the closing. The 2005 NRG Energy/Texas Genco agreement, as set forth in Annex B, also utilized a buyer election mechanism where NRG, the buyer, had the option to pay a portion of the purchase price with additional shares of common stock, additional cash, shares of new series of preferred stock or combination of the foregoing within the context of an overall unit structure. A variation on that theme, albeit not involving a buyer election, is the 2015 Western Digital/SanDisk deal, as set forth in Annex L, in which the mix of Western Digital stock and cash that SanDisk shareholders are entitled to receive is adjusted (to increase the stock component and decrease the cash component) in the event a previously announced equity investment by a Chinese company in Western Digital had not closed or was terminated. As it happened, the Chinese company terminated its planned investment after a decision by the Committee on Foreign Investment in the United States to conduct an investigation into the proposed investment (resulting in SanDisk shareholders becoming entitled to receive the alternate merger consideration).

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 ultimately adopted in September 2008, 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. Kraft's 2010 acquisition of Cadbury took advantage of these rule changes and included 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, the CME Group/NYMEX transaction set forth in Annex E, the Aon/Hewitt Associates transaction set forth in Annex G and the AECOM Technology Corporation/URS Corporation transaction set forth in Annex K 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 and the Freeport-McMoRan/Plains Exploration transaction set forth in Annex I 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 these cases, the proration mechanisms of the original unit structure effectively capped the overall amounts of cash and stock available in the mix and match election. As set forth in Annex L, there were several transactions in 2015 with either an equalizer, as seen by the Royal Bank of Canada/City National Corp transaction (in which shareholders were permitted to elect to receive for each City National Corp share, subject to proration, cash in an amount equal to the "Per Share Amount" or a number of shares of RBC common stock equal to the "Per Share Amount" divided by the volume-weighted average trading price of RBC common shares for the ten trading day period preceding closing, with (i) the Per Share Amount equal to the "Closing Transaction Value" of City National Corp divided by the total number of outstanding City National Corp shares and (ii) the Closing Transaction Value equal to the aggregate cash consideration to be paid at closing and the value of the RBC common shares to be issued at closing (with such value based on the volume weighted average trading price of RBC common shares for the ten trading days preceding closing)) or a quasi-equalizer mechanism, as seen in the Pfizer/Allergan deal (in which Pfizer stockholders have the right to elect to receive for each Pfizer share one share of common stock of Allergan or a cash amount equal to the volume weighted average trading price of Pfizer common stock on the day before closing, subject to proration to ensure that the aggregate cash consideration paid in the merger is not less than \$6 billion and does not exceed \$12 billion) and the MeadWestvaco/Rock-Tenn deal (in which Rock-Tenn shareholders have the right to elect to receive for each Rock-Tenn share, subject to proration, either (i) an amount in cash equal to the volume weighted average price per share of Rock-Tenn on the NYSE for the five trading days immediately preceding the third trading day prior to closing or (ii) one share of a newly formed TopCo holding company).
- 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<sup>5</sup>

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.<sup>6</sup> 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 acquiror must meet a certain threshold percentage. Legal tax practitioners are generally comfortable with COI amounts in the 40-45% range.<sup>7</sup>

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 overall percentage of stock consideration meets the required threshold percentage.<sup>8</sup> 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.<sup>9</sup> 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 Treas. Reg. §1.368-1(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.<sup>10</sup> 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 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

<sup>5</sup> Although beyond the scope of this article, we note that use of corporate "inversions" (in which a U.S. company is acquired by a foreign company and as a result the corporate group may be able to achieve certain benefits from tax planning) has led to some of the largest recent transactions but has caused controversy and attracted unfavorable political attention, with the Pfizer/Allergan deal in 2015 (set forth in Annex L), the Actavis/Allergan deal in 2014 (set forth in Annex K) and the Eaton Corporation/Cooper Industries deal in 2012 (set forth in Annex I) being examples of inversion transactions.

<sup>6</sup> There is 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.

<sup>7</sup> Treasury regulations contain an example that concludes COI was satisfied where stock represented 40% of the value of the consideration.

<sup>8</sup> 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.

<sup>9</sup> 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. Regulations finalized in late 2011 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).

<sup>10</sup> 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.



value.<sup>11</sup> 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**

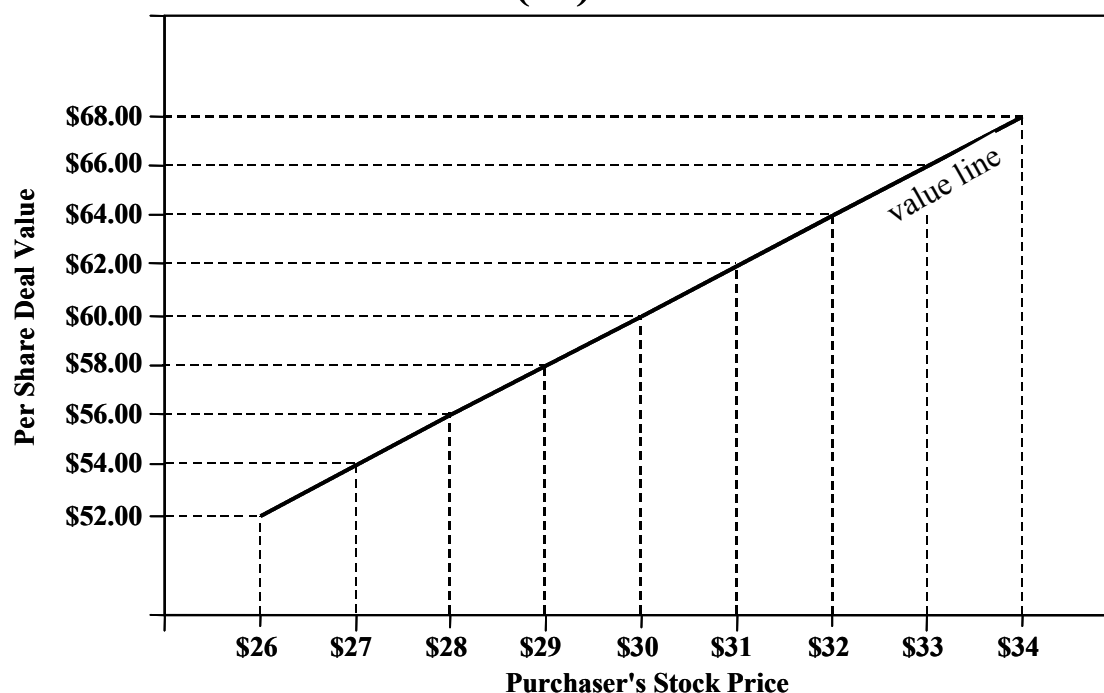
In all-stock or mixed consideration transactions, there are inherent risks on both sides that the agreed upon value may vary, sometimes substantially, between the signing and closing of the transaction as a result of changes in the price of the purchaser's stock. Such risks must be dealt with (or at 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 ten years have utilized a fixed ratio as opposed to a fixed value structure (with a slight resurgence in fixed value transactions in 2014 as seen by the transactions listed in Annex K). 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 transactions announced in the latter half of 2008 and 2009 listed in Annexes E and F, respectively, 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. 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.

<sup>11</sup> 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.

## Fixed Ratio (no collar) (2x)



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).

Each of the largest announced or proposed transactions from 2004 through 2015 on Annexes A through L, given the termination of the AT&T/T-Mobile transaction, were all-stock examples of this form or included a fixed ratio stock component. 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 March 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; 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; in the April 2010 CenturyLink/Qwest transaction, each share of Qwest common stock was exchanged for 0.1664 shares of CenturyLink common stock; in the July 2011 Express Scripts/Medco Health transaction, each share of Medco common stock was exchanged for 0.81 shares of Aristotle Holding, Inc., a direct wholly owned subsidiary of Express Scripts, and \$28.80 cash; in the Softbank/Sprint transaction announced in October 2012, each share of Sprint common stock was exchanged for one share of common stock in a new publicly traded Sprint parent entity ("New Sprint") or \$7.30 in cash; in the Omnicom/Publicis self-described merger of equals announced in July 2013 (and set forth at Annex J (and subsequently terminated)), each issued and outstanding share of Publicis would have been exchanged for 1 share of Publicis Omnicom Group N.V. (the "NewCo"), while each issued and outstanding share of Omnicom would have been exchanged for 0.813008 shares of NewCo; shareholders of Publicis and Omnicom would have received special transaction dividends of €1.00 and \$2.00 per share, respectively, subject to adjustments; in the November 2014 Allergan-Actavis PLC transaction, each share of Allergan, Inc. common stock will be converted into the right to receive a combination of 0.3683 of an Actavis share and \$129.22 in cash; and in the 2015 Pfizer-Allergan transaction (as set forth in Annex L), each share of Pfizer common stock will be converted into the right to receive either one share of Allergan or a cash amount equal to the volume weighted average trading price of Pfizer common stock on the day before closing, subject to proration to ensure that the aggregate cash consideration paid in the merger is not less than \$6 billion and does not exceed \$12 billion.

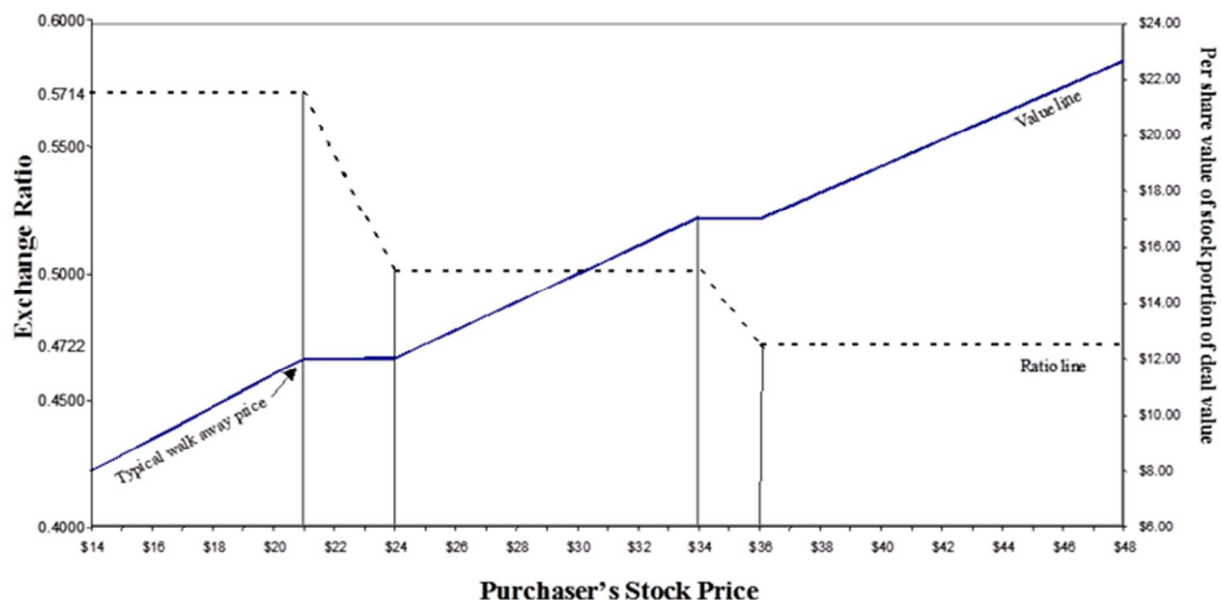
Although a fixed ratio is simpler, the value of the transaction will fluctuate based upon changes in the value of the purchaser's stock (i.e., as the value of the purchaser's stock increases, the target's stockholders receive greater value for their shares and vice versa). To protect the seller's stockholders 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. 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.

The precise contours of these deals are only limited by the imagination of the participants, and they can get quite complicated. Southwest's 2011 acquisition of AirTran demonstrates how elements of both fixed and floating value structures can be combined and that the structuring choices available in these transactions represent a full spectrum of options rather than twin poles of fixed or floating value. The Southwest/AirTran transaction set forth in Annex G provided for a fixed ratio on the stock component of the consideration (which represented between 48.4% and 51.7% of the value of the cash/stock unit, assuming no cash "top-up" as described below) but only within a narrow collar range (1.4% above and 12.5% below the Southwest closing price on the day prior to the transaction announcement). Outside of this range, the exchange ratio floated in a manner that ensured that AirTran shareholders would always receive between \$7.25 and \$7.75 per share. This adjustment effectively provided AirTran shareholders with a fixed value transaction that employed a fixed ratio within a very tight band resulting in some modest fluctuation in transaction value. While AirTran shareholders were protected from any significant decline in Southwest's share price through the collar mechanism, Southwest could have suffered unlimited dilution in connection with the adjustment in the exchange ratio needed to achieve at least \$7.25 in per share value to the extent its stock price were to decline significantly between signing and closing. In order to eliminate that risk, Southwest had the option of substituting cash in lieu of issuing the incremental shares that would have been needed to provide AirTran shareholders with their minimum guaranteed value. Based on the average of \$11.90 of Southwest's closing

prices for the 20 trading days ending three trading days prior to the closing date of May 2, 2011, each share of AirTran common stock was exchanged for \$3.75 in cash and 0.321 shares of Southwest's common stock. The transaction valued AirTran common stock at approximately \$7.57 per share, or approximately \$1.0 billion in the aggregate, excluding shares issuable upon conversion of AirTran's outstanding convertible notes.

As indicated in Annex B, a transaction that utilized a collar mechanism was 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:

### Fixed Ratio with Collar



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.

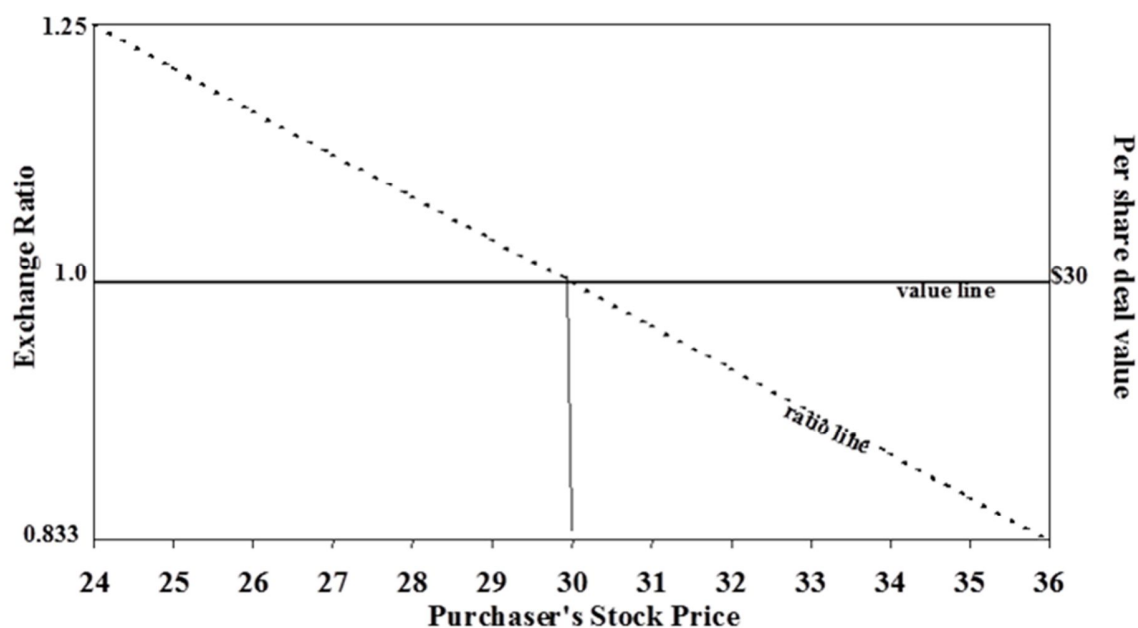
#### Fixed Value Transactions

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.

### Fixed Value Deal (no collar)



\* 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).<sup>12</sup> 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.<sup>13</sup> Examples of this "fixed value with collar" structure

<sup>12</sup> 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 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.

<sup>13</sup> 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.

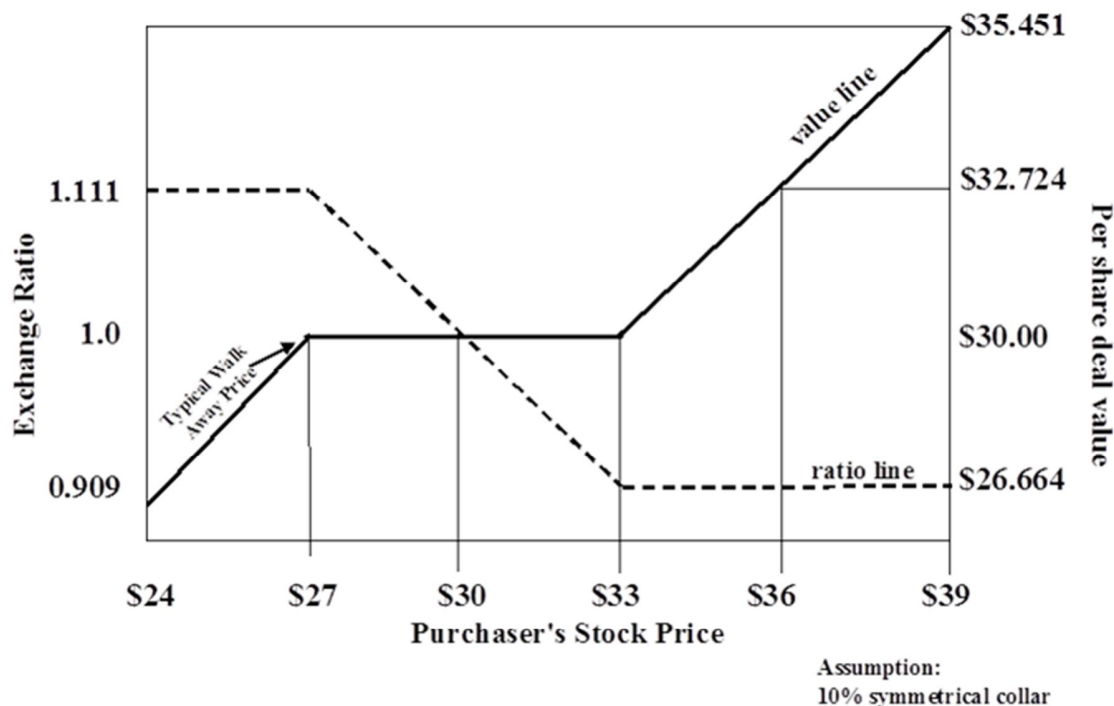
In a competitive auction or "deal-jump" situation, a stock component that does trigger a purchaser shareholder vote (or SEC filing requirements) may be a significant liability. For example, in the early 2007 competition for Equity Office Properties Trust between Blackstone Real Estate Partners and Vornado Realty Trust, Vornado's mixed consideration offer, which would have required a Vornado shareholder vote, was rejected by Equity Office despite its higher

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, the Berkshire Hathaway/Burlington Northern transaction set forth in Annex F, the Tyco International/Brink's transaction set forth in Annex G, the ultimately terminated AT&T/T-Mobile transaction and the J&J/Synthes transaction set forth in Annex H, the W.P. Carey Inc./Corporate Property Associates 16 – Global Incorporated, Fidelity National Financial Inc./Lender Processing Services Inc., and American Realty Capital Properties, Inc./American Realty Capital Trust IV, Inc., transactions, all set forth in Annex J, and the AT&T Inc./DirecTV Inc., Dollar Tree, Inc./ Family Dollar Stores, Inc., GTech S.p.A./International Game Technology and NorthStar Realty Finance Corp./Grubb & Ellis Healthcare REIT transactions from 2014, all set forth in Annex K.

In such transactions, 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, such as the right obtained by Lender Processing Services Inc. in the agreement for its acquisition by Fidelity National Financial Inc. (although, not in the J&J/Guidant failed transaction, the successful Boston Scientific/Guidant, Berkshire Hathaway/Burlington Northern, Tyco International/Brink's, the J&J/Synthes transaction and the terminated AT&T/T-Mobile transaction). 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. Adding yet another level of complexity, some transactions with a collar provide a "cash top-up" unrelated to a walk-away right to make up the lost value if the collar and cap act to prevent the issuance of some shares of acquiror. An example of such a transaction from 2014 is the GTech S.p.A./International Game Technology transaction, set forth at Annex K. The 2013 American Realty Capital Properties, Inc./American Realty Capital Trust IV, Inc. deal, set forth at Annex J, allowed the acquiror either to pay the cash top-up or "release" the cap in order to allow the fixed value formula to work.

This type of exposure to market risk is also tempered in the context of the unusual "reverse fixed value" consideration structure employed in the 2012 Hudson City/M&T Bank transaction set forth in Annex I. This fairly unique twist on both the fixed value and fixed ratio structures presented Hudson City shareholders with a choice between a fixed ratio of shares of M&T stock or a cash amount that is equal to a product of this fixed ratio and the average market price of the purchaser's stock before closing, subject to proration. Unlike a typical cash/stock election, both components here effectively "float" in value with the value of the acquiror's stock, which has pros and cons to all concerned. The seller's shareholders appear to have downside and upside risk on both the cash and stock components, and while the purchaser has the risk of the cash value going up, that only comes when the value of its stock has risen (a good thing!) and the amount of total cash exposure is capped by proration.

### Fixed Value with Collar



*\*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. 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 and allow target shareholders to share in the risk and reward of the transaction or a specific component thereof, such as obtaining required regulatory approvals or favorable trial results in the pharmaceutical industry. 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. Although relatively rare, alternative equity instruments like CVRs and warrants were utilized in the 2008 Invitrogen Corp./Applied Biosystems transaction, as set forth in Annex E, the 2010 Celgene/Abraxis Bioscience transaction, as set forth in Annex G, in Kinder Morgan's 2011 acquisition of El Paso, as set forth in Annex H, in Community Health Systems, Inc.'s acquisition of Health Management Associates, Inc., in 2013, set forth in Annex J and in Energy Transfer's acquisition of the Williams Companies and Dell's acquisition of EMC Corporation, both set forth in Annex L. In the Kinder Morgan/El Paso transaction, stockholders were offered the choice to elect among a package of cash, stock and warrants, subject to proration and reallocation in order to achieve a 57/43 cash-stock split (excluding warrants).<sup>14</sup> The CVRs in the Community Health Systems/Health Management Associates were issued on a per-unit basis to stockholders of the target and were connected to the final resolution of certain legal matters involving the target. If the losses suffered by the acquiror exceeded a certain amount, then the amounts to which holders of the CVRs were entitled would be commensurately reduced. In the Energy Transfer/Williams Companies transaction, each share of Energy Transfer stock issued as merger consideration will have attached one contingent consideration right, which provide that in the event that the daily volume weighted average trading price of Energy Transfer common shares for the 23-month period following the 20th trading day after the closing (the "Measurement Period") is less than the daily volume weighted average trading price of Energy Transfer common units during the Measurement Period, then ETC will make a one-time payment in an amount equal to such difference (the "Shortfall Amount"). Any Shortfall Amount will be settled in Energy Transfer common shares or cash at Energy Transfer's election. If, however, the daily volume weighted average trading price of ETC common shares during the Measurement Period is equal to or greater than the daily volume weighted average trading price of Energy Transfer common units during the Measurement Period, then the contingent consideration right will expire with no value. Dell's 2015 acquisition of EMC Corporation, as set forth in Annex L, utilized tracking stock, which is an equity instrument even more unusual in the acquisition context than CVRs. In connection with the transaction, Dell is issuing to EMC stockholders a new class of common stock of Dell (the "Class V Common Stock") intended to track an economic interest in the VMware business, but which will not have voting rights with respect to the VMware stock owned by EMC. EMC owns over 80% of VMware, which is a publicly listed company traded on the New York Stock Exchange. At the closing of the Dell acquisition transaction, each EMC share will be converted into (i) a number of shares of Class V Common Stock equal to 222,966,450 divided by the aggregate number of EMC shares issued and outstanding immediately prior to the Effective Time and (ii) \$24.05 in cash.

### 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

<sup>14</sup> While the scope of this article does not encompass all-cash deals, it is interesting to note that in Sanofi-Aventis' 2011 all-cash acquisition of Genzyme, in addition to \$74 in cash per share, Genzyme stockholders received a CVR for each share that entitles the holder to cash payments if specified milestones relating to certain drugs are achieved over time.



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/Mallinckrodt 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 Mallinckrodt 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 drafting 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.<sup>15</sup>

#### 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 (as well as foreign corporate law statutes) not to 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.<sup>16</sup>

<sup>15</sup> A noteworthy development beginning in early 2009 has been 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 a 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 continue to watch going forward but to date these provisions have largely been negotiated on a deal-by-deal basis. A recent non-comprehensive survey we did of 267 strategic deals for U.S. public companies with equity value over \$1 billion between January 2008 and November 2014 indicated that approximately 13% of deals contained some form of financing optionality.

<sup>16</sup> In the case of *In re Southern Peru Shareholder Derivative Litigation*, C.A. No. 961-CS (Del. Ch. Oct. 14, 2011), Chancellor Strine of the Delaware Chancery Court seemingly criticized a special committee of Southern Peru Copper Corporation for not reassessing its recommendation that stockholders vote in favor of the proposed acquisition of a privately held mining company controlled by Southern Peru's controlling stockholder. Southern Peru had agreed to a fixed exchange ratio in the transaction and the Court found that, after signing the merger agreement, Southern Peru outperformed its EBITDA projections and its stock price rose leading up to the stockholder vote. The Court found that Southern Peru's special committee did not reassess or change its recommendation. Because Southern Peru's second largest stockholder had entered into a voting agreement that required it to vote in accordance with the special committee's recommendation, the Court apparently believed that a change in the special committee's recommendation would have likely led to a rejection of the transaction.

## 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). Fairness opinions in cash/stock deals with "election" mechanisms also often have special language to the effect that the opinion is rendered only as to the blended aggregate cash/stock combined consideration, as though it were a unit deal, and that no recommendation is given by the banker as to what election should be made by any shareholder.

R.E.S.  
SIMPSON THACHER & BARTLETT LLP

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

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)<sup>17</sup></b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	JP Morgan Chase & Co.	Bank One Corporation	58,760.6	1/14/04	Common Stock	--	Yes	No	No	No
2.	Sprint Corporation	Nextel Communications, Inc.	38,975.1	12/15/04	Common stock and cash	Unit	Yes	No	No	No
3.	Johnson & Johnson	Guidant Corporation <sup>18</sup>	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	No	No
5.	Symantec Corporation	Veritas Software Corporation	13,519.7	12/16/04	Common stock	--	Yes	No	No	No
6.	Exelon Corporation	Public Service Enterprise Group Incorporated	12,293.6	12/20/04	Common stock	--	Yes	No	No	No
7.	Kmart Holding Corporation	Sears, Roebuck and Co.	10,901.3	11/17/04	Common stock or cash	Election, pro rata	Yes	No	No	No
8.	SunTrust Banks, Inc.	National Commerce Financial Corporation	7,025.1	5/09/04	Common stock or cash	Election, equalizer	Yes	No	No	No
9.	Harrah's Entertainment, Inc.	Caesars Entertainment, Inc.	6,332.3	7/15/04	Common stock or cash	Election, pro rata	Yes	No	No	No
10	North Fork Bancorporation, Inc.	Greenpoint Financial Corp.	6,270.2	2/16/04	Common stock	--	Yes	No	No	No
11.	Regions Financial Corporation	Union Planters Corporation	5,846.1	1/23/04	Common stock	--	Yes	No	No	No

<sup>17</sup> The deal value for substantially all of the transactions contained in this and the following annexes was obtained from Thomson One, from the stated "Deal Value," which appears to be in most cases the equivalent of equity value as opposed to enterprise value.

<sup>18</sup> 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.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)<sup>17</sup></b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
12.	UnitedHealth Group Incorporated	Oxford Health Plans, Inc.	4,961.2	4/26/04	Common stock and cash	Unit	Yes	No	No	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	No	No
15.	Mylan Laboratories Inc.	King Pharmaceuticals, Inc.	4,026.6	7/26/04	Common stock	--	Yes	No	No	No

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

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	Proctor & Gamble Co.	Gillette Co.	54,906.8	1/27/05	Common stock	--	Yes	No	No	No
2.	Bank of America Corp.	MBNA Corp.	35,810.3	6/30/05	Common stock and cash	Unit	Yes	No	No	No
3.	ConocoPhillips	Burlington Resources Inc.	35,600.0	12/12/05	Common stock and cash	Unit	Yes	No	No	No
4.	ChevronTexaco Corporation	Unocal Corp.	18,718.5	4/4/05	Common stock or cash	Election, pro rata	Yes	No	No	No
5.	Federated Department Stores Inc.	May Department Stores Co.	16,465.9	2/27/05	Common stock and cash	Unit	Yes	No	No <sup>19</sup>	No
6.	SBC Communications Inc.	AT&T Corp	14,732.6	1/30/05	Common stock	--	Yes	No	No	No
7.	Pernod Ricard S.A.	Allied Domecq PLC	14,414.1	4/21/05	Common stock and cash	Unit <sup>20</sup>	Yes	No	No	No
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	No	No
11.	R.H. Donnelley Corporation	Dex Media, Inc.	9,449.4	10/3/05	Common stock and cash	Unit	Yes	No	No	No

<sup>19</sup> 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.

<sup>20</sup> 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).

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
12.	Valor Communications Group Inc.	ALLTEL Corporation's Wireline Business	9,096.0	12/9/05	Common stock	--	Yes	No	No	No
13.	Duke Energy Corp.	Cinergy Corp.	8,832.9	5/9/05	Common stock	--	Yes	No	No	No
14.	Valero Energy Corp.	Premcor Inc.	8,521.6	4/24/05	Common stock or cash	Election, pro rata	Yes	No	No	No
15.	Verizon Communications Inc.	MCI Inc.	8,495.6	2/14/05	Common stock and cash <sup>21</sup>	Unit	Yes	No	Yes	No
16.	NRG Energy, Inc.	Texas Genco LLC	8,325.0	9/30/05	Common stock and cash <sup>22</sup>	Unit	No	Yes	Yes	No

<sup>21</sup> 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.

<sup>22</sup> 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**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	AT&T Inc.	BellSouth Corp.	72,671.0	3/5/06	Common stock	--	Yes	No	No	No
2.	Mittal Steel Co NV	Arcelor SA	32,240.5	6/25/06	Common stock or cash	Election, pro rata <sup>23</sup>	Yes	No	No	No
3.	Freeport-McMoRan Copper & Gold	Phelps Dodge Corp.	25,833.7	11/19/06	Common stock and cash	Unit	Yes	No	No	No
4.	Wachovia Corp.	Golden West Financial Corp	25,500.9	5/7/06	Common stock and cash	Unit	Yes	No	No	No
5.	CVS Corp.	Caremark RX Inc.	22,981.1	11/1/06	Common stock	--	Yes	No	No	No
6.	Investor Group <sup>24</sup>	Albertson's	17,073.8	1/22/06	Common stock and cash	Unit	Yes	No	No	No
7.	Bank of New York	Mellon Financial	15,679.6	12/4/06	Common stock <sup>25</sup>	--	Yes	No	No	No
8.	Capital One Financial	North Fork Bancorp	15,132.9	3/12/06	Common stock or cash	Election, equalizer	Yes	No	No	No
9.	Alcatel SA	Lucent Technologies	13,591.2	3/24/06	Common stock	--	Yes	No	No	No
10.	Thermo Electron	Fisher Scientific	10,291.8	5/8/06	Common stock	--	Yes	No	No	No
11.	NYSE Group	Euronext SA	10,203.4	5/22/06	Common stock and cash	Unit <sup>26</sup>	Yes	No	No	No
12.	Regions Financial	AmSouth Bancorp	10,020.8	5/25/06	Common stock	--	Yes	No	No	No
13.	CBOT Holdings	Chicago Mercantile Exchange	8,007.1	10/17/06	Common stock or cash	Election, equalizer	Yes	No	No	No

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> 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.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
14.	Mercantile Bankshares	PNC Financial Services	5,981.8	10/9/06	Common stock and cash	Unit	Yes	No	No	No



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

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	BHP Billiton Ltd.	Rio Tinto PLC	189,751.94	11/8/07 <sup>27</sup>	Common stock <sup>28</sup>	--	Yes	No	No	No
2.	RFS Holdings BV <sup>29</sup>	ABN AMRO Holding NV	99,364.81	4/25/07	Common stock and cash	Unit	Yes	No	No	No
3.	Unicredito Italiano SpA	Capitalia SpA	29,528.09	5/15/07	Common stock	--	Yes	No	No	No
4.	Thomson Corp.	Reuters Group PLC	17,628.12	5/7/07	Common stock and cash	Unit	Yes	No	No	No
5.	Transocean Inc.	GlobalSantaFe Corp.	17,298.66	7/23/07	Common stock and cash	Unit	Yes	No	No	No
6.	BBVA SA	Compass Bancshares Inc.	9,870.56	2/16/07	Common stock or cash	Election, pro rata	Yes	No	No	No
7.	Ingersoll-Rand Co. Ltd.	Trane Inc.	9,750.75	12/17/07	Common stock and cash	Unit	Yes	No	No	No
8.	Toronto-Dominion Bank	Commerce Bancorp	8,638.21	10/2/07	Common stock and cash	Unit	Yes	No	No	No
9.	National Oilwell Varco Inc.	Grant PrideCo Inc.	7,513.45	12/17/07	Common stock and cash	Unit	Yes	No	No	No
10.	Wachovia Corp.	AG Edwards Inc.	6,944.36	5/31/07	Common stock and cash	Unit	Yes	No	No	No
11.	Marathon Oil Corp.	Western Oil Sands Inc.	6,185.32	7/31/07	Common stock or cash	Election, pro rata	Yes	No	No	No

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> 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.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
12.	News Corp.	Dow Jones & Co. Inc.	5,109.65	5/1/07	Common stock or cash	Election, pro rata <sup>30</sup>	No	Yes	No	No
13.	Vulcan Materials Co.	Florida Rock Industries Inc.	4,658.67	2/19/07	Common stock or cash	Election, pro rata	Yes	No	No	No
14.	State Street Corp.	Investors Financial Services Corp.	4,533.04	2/5/07	Common stock	--	Yes	No	No	No

<sup>30</sup> 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 2007**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	Bank of America Corp.	Merrill Lynch & Co. Inc.	48,766.15	9/14/08	Common stock	--	Yes	No	No	No
2.	Microsoft Corp.	Yahoo! Inc.	43,711.60	2/1/08 <sup>31</sup>	Common stock or cash	Election, pro rata	Yes	No	No	No
3.	Lloyds TSB Group PLC	HBOS PLC	25,439.45	9/17/08	Common stock	--	Yes <sup>32</sup>	No	No	No
4.	Wells Fargo & Co.	Wachovia Corp.	15,111.99	10/3/08	Common stock	--	Yes	No	No	No
5.	Teck Cominco Ltd.	Fording Canadian Coal Trust	13,599.13	7/29/08	Common stock and cash	Unit	Yes	No	No	No
6.	CenturyTel, Inc.	Embarq Corp.	11,559.41	10/27/08	Common stock	--	Yes	No	No	No
7.	Cleveland-Cliffs Inc.	Alpha Natural Resources Inc.	9,089.25	7/16/08 <sup>33</sup>	Common stock and cash	Unit	Yes	No	No	No
8.	Teva Pharmaceutical Industries	Barr Pharmaceutical Inc.	8,810.21	7/18/08	Common stock and cash	Unit	Yes	No	No	No
9.	CME Group Inc.	NYMEX Holdings Inc.	7,555.37	1/28/08	Common stock or cash	Election, equalizer	Yes	No	No	No
10	Invitrogen Corp	Applied Biosystems Group	6,683.46	6/10/08	Common stock or cash or combination	Election, pro rata	Yes	No <sup>34</sup>	No	No

<sup>31</sup> 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.

<sup>32</sup> 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.

<sup>33</sup> 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 after it was announced when Cleveland Natural Resources' largest shareholder, Harbinger Capital Management, announced that it opposed the transaction.

<sup>34</sup> 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

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
11.	Exelon Corp.	NRG Energy Inc. <sup>35</sup>	6,260.76	10/19/08	Common stock	--	Yes	No	No	No
12.	Republic Services Inc.	Allied Waste Industries Inc. <sup>36</sup>	6,113.97	6/23/08	Common stock	--	Yes	No	No	No
13.	PNC Financial Services Group	National City Corp.	5,617.67	10/24/08	Common stock	--	Yes	No	No	No
14.	Bank of America Corp.	Countrywide Financial Corp.	4,143.85	1/11/08	Common stock	--	Yes	No	No	No
15.	Ashland Inc.	Hercules Inc.	3,323.25	7/11/08	Common stock and cash	Unit	Yes	No	No	No
16.	Delta Air Lines Inc.	Northwest Airlines Inc.	2,958.29	4/14/08	Common stock	--	Yes	No	No	No

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.

<sup>35</sup> 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 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.

<sup>36</sup> 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**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	Pfizer Inc.	Wyeth	67,285.70	1/26/09	Common stock and cash	Unit	Yes	No	No <sup>37</sup>	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	3/9/09	Common stock and cash	Unit	Yes	No	No	No
4.	Berkshire Hathaway Inc.	Burlington Northern Santa Fe	36,724.00 <sup>38</sup>	11/3/09	Common stock or cash	Election, pro rata <sup>39</sup>	No	Yes	Yes	No
5.	Suncor Energy Inc.	Petro-Canada	15,581.71	3/23/09	Common stock	--	Yes	No	No	No
6.	DirecTV Group Inc.	Liberty Entertainment Inc.	15,243.05	5/4/09	Common stock	--	Yes	No	No	No
7.	Xerox Corp.	Affiliated Computer Services Inc.	8,374.20 <sup>40</sup>	9/28/09	Common stock and cash	Unit	Yes	No	No	No
8.	Agrium Inc.	CF Industries Holdings Inc.	5,597.30	2/25/09	Common stock and/or cash	Election, pro rata <sup>41</sup>	Yes	No	No	No
9.	PepsiCo Inc.	Pepsi Bottling Group Inc.	5,421.63	4/20/09	Common stock or cash	Election, pro rata	Yes	No	No	No
10	Baker Hughes Inc.	BJ Services Co.	5,240.49	8/31/09	Common stock and cash	Unit	Yes	No	No	No

<sup>37</sup> 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.

<sup>38</sup> The \$36 billion transaction value represented 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 was approximately \$44 billion.

<sup>39</sup> The cash and stock elections that Burlington Northern stockholders made with respect to their shares were subject to proration and reallocation to achieve a 60/40 cash-stock split.

<sup>40</sup> Part of the deal value included approximately \$2 billion in debt that Xerox assumed under the agreement.

<sup>41</sup> In March of 2010, Agrium abandoned its long-running attempted hostile takeover of CF Industries. Agrium's proposed exchange offer would have allowed CF shareholders to elect to receive cash consideration or stock consideration subject to proration to ensure that no more than 47% of the shares tendered were exchanged for cash and no more than 53% of the shares tendered were exchanged for Agrium common shares.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
11.	Walt Disney Co.	Marvel Entertainment Inc.	3,958.35	8/31/09	Common stock and cash	Unit	Yes <sup>42</sup>	No	No	No
12.	Stanley Works	Black & Decker Corp.	3,469.75	11/2/09	Common stock	--	Yes	No	No	No
13.	Pulte Homes Inc.	Centex Corporation	3,105.76	4/9/09	Common stock	--	Yes			
14.	Fidelity National Information Services Inc.	Metavante Technologies Inc.	2,978.30	4/1/09	Common stock	--	Yes	No	No	No

<sup>42</sup> Marvel stockholders were 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 was subject to revision (although no revision ultimately took place) in order to ensure that the aggregate stock consideration was no less than 40% of the total deal consideration payable at closing, in which case the exchange ratio would have been increased, and the amount of cash paid per share of Marvel common stock would have been correspondingly decreased, until the total stock consideration equaled 40% of the aggregate merger consideration.

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

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	CenturyLink Inc.	Qwest Communications International Inc.	22,276.24	4/22/10	Common stock	--	Yes	No	No	No
2.	Kraft Foods Inc.	Cadbury PLC	18,769.00	1/19/10	Common stock or cash	Election, pro rata <sup>43</sup>	Yes	No	No	No
3.	Schlumberger Ltd.	Smith International, Inc.	11,041.61	2/21/10	Common stock	--	Yes	No	No	No
4.	FirstEnergy	Allegheny Energy, Inc.	8,500.00	2/11/10	Common stock	--	Yes	No	No	No
5.	Aon Corporation	Hewitt Associates, Inc.	4,804.32	7/12/10	Common stock and/or cash	Election, equalizer <sup>44</sup>	Yes	No	No	No
6.	Northeast Utilities	NSTAR	4,198.44	10/18/10	Common stock	--	Yes	No	No	No
7.	BMO Financial Group (Bank of Montreal)	Marshall & Ilsley Corp.	4,094.98	12/17/10	Common stock	--	Yes	No	No	No
8.	Apache Corp.	Mariner Energy, Inc.	3,916.29	4/15/10	Common stock or cash <sup>45</sup>	Election, pro rata	Yes	No	No	No
9.	UAL Corp.	Continental Airlines, Inc.	3,170.00	5/3/10	Common stock	--	Yes	No	No	No

<sup>43</sup> Although the unit form of consideration in the tender offer was the default consideration available to Cadbury shareholders, Cadbury shareholders tendering into the offer were able to 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.

<sup>44</sup> The cash and stock elections that Hewitt stockholders made with respect to their shares were subject to proration and reallocation to achieve an approximate 50/50 cash-stock split.

<sup>45</sup> The cash and stock elections that Mariner stockholders made with respect to their shares were subject to proration and reallocation to achieve an approximate 30/70 cash-stock split. Under the merger agreement, Mariner stockholders were entitled to elect to receive consideration consisting of cash, shares of Apache common stock or a combination of both in exchange for their shares of Mariner common stock, subject to a proration feature. Mariner stockholders electing to receive a mix of cash and stock consideration and non-electing stockholders received \$7.80 in cash and 0.17043 shares of Apache common stock in exchange for each share of Mariner common stock. Subject to proration, Mariner stockholders electing to receive all cash received \$26.00 in cash per Mariner share and Mariner stockholders electing to receive only Apache common stock received 0.24347 shares of Apache common stock in exchange for each share of Mariner common stock. Since the Apache common stock consideration was oversubscribed, Mariner stockholders who made valid elections to receive all stock consideration ultimately received, for each share subject to election, approximately 81.4 percent of the merger consideration in common stock, or 0.198113 of a share of Apache common stock and \$4.84 in cash.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation, Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
10	Celgene Corporation	Abraxis Bioscience Inc.	2,900.00	6/30/10	Common stock and cash <sup>46</sup>	Unit	Yes	No	No	No
11.	AGL Resources Inc.	Nicor Inc.	2,382.46	12/7/10	Common stock and cash	Unit	Yes	No	No	No
12.	Tyco International Ltd.	Brink's Home Security Holdings, Inc.	1,946.58	1/18/10	Common stock and/or cash	Election, pro rata <sup>47</sup>	No	Yes	Yes	No
13.	RRI Energy, Inc.	Mirant Corporation	1,700.00	4/11/10	Common stock	--	Yes	No	No	No
14.	SandRidge Energy, Inc.	Arena Resources, Inc.	1,660.72	4/4/10	Common stock and cash	Unit	Yes	No	No	No
15.	MSCI Inc.	RiskMetrics Group Inc.	1,543.45	3/1/10	Common stock and cash	Unit	Yes	No	No	No
16.	First Niagara Financial Group	NewAlliance Bancshares Inc.	1,447.21	8/19/10	Common stock or cash	Election, pro rata <sup>48</sup>	Yes	No	No	No
17.	Hertz Global Holdings, Inc.	Dollar Thrifty Automotive Group, Inc. <sup>49</sup>	1,200.00	4/25/10	Common stock and cash	Unit	Yes	No	No	No
18.	Southwest Airlines Co.	AirTran Holdings, Inc.	1,041.69	9/27/10	Common stock and cash	Unit	Yes <sup>50</sup>	No	Yes	No

<sup>46</sup> In addition to a cash/stock unit, each Abraxis share also received one tradeable Contingent Value Right, which entitles its holder to receive payments for future regulatory milestones and commercial royalties.

<sup>47</sup> The deal provided that the stock election was unlimited, but the cash election had a cap of approximately 30% of the total merger consideration and was subject to proration to achieve the 30% limitation. In addition, Brink's stockholders were entitled to receive a combination of cash and stock, which was blended to provide for approximately 30% cash.

<sup>48</sup> The cash and stock elections that NewAlliance stockholders made with respect to their shares were subject to proration and reallocation to achieve a 14/86 cash-stock split.

<sup>49</sup> In October 2010, Dollar Thrifty's shareholders rejected the proposed acquisition by Hertz following the announcement of a competing offer by Avis. After subsequent competing offers, Avis and Hertz withdrew their final offers on September 24, 2011 and October 27, 2011, respectively. Hertz resumed its acquisition attempt in 2012, and was successful in signing a Merger Agreement with Dollar Thrifty (along with HDTMS, Inc., Hertz's wholly owned subsidiary) on August 26 of that year. Pursuant to the terms of the agreement, HDTMS commenced a tender offer to purchase all outstanding shares of Dollar Thrifty's stock for \$87.50 per share in September, thereby acquiring approximately 99.6% of Dollar Thrifty's outstanding shares. On November 19, the acquisition was completed via short-form merger when HDTMS exercised its "top-up" option under the Merger Agreement to purchase additional shares directly from Dollar Thrifty.

<sup>50</sup> AirTran shareholders were entitled to receive 0.321 common shares of Southwest and \$3.75 in cash for each share they owned. If the average closing price of Southwest common shares for the 20 consecutive trading day period prior to the closing date of the merger was greater than \$12.46, then the exchange ratio would have been adjusted to equal \$4.00 divided by the average Southwest share price. If the Southwest average share price was less than \$10.90, then the exchange ratio would have been adjusted to equal \$3.50 divided by the average Southwest share price. The exchange ratio adjustment mechanism provided at least \$7.25 in value and up to \$7.75 in value (based on the Southwest average share price) per share of AirTran common stock. If the Southwest average share price was less than \$10.90, Southwest would have been required to deliver, at its election, an additional amount of cash, an additional number of shares of Southwest common stock or a combination thereof (as elected by Southwest) such that the aggregate value of the cash and shares of Southwest common stock (valuing Southwest common stock based on the Southwest average share price) into which each share of AirTran common stock has been converted would be equal to \$7.25 – this option to "top up" with cash to provide AirTran shareholders with \$7.25 of value protected Southwest against unlimited dilution as a result of a floating exchange ratio. Based on the average of \$11.90 of Southwest's closing prices for the 20 trading days ending three trading days prior to the closing date of May 2, 2011, each share of AirTran common stock was exchanged for \$3.75 in cash and 0.321 shares of Southwest's common stock.



**Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2011**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	AT&T Inc.	T-Mobile USA, Inc.	39,000.00	3/20/2011	Common stock and cash <sup>51</sup>	Unit	No	Yes	Yes	No
2.	Express Scripts, Inc.	Medco Health Solutions, Inc.	29,370.07	7/21/11	Common stock and cash	Unit	Yes	No	No	No
3.	Duke Energy Corporation	Progress Energy, Inc.	25,818.33	1/10/11	Common stock	--	Yes	No	No	No
4.	Kinder Morgan Inc.	El Paso Corporation	24,002.09	10/16/11	Mixed combination of common stock, cash and warrants <sup>52</sup>	Election, pro rata	Yes	No	No	No
5.	Johnson & Johnson	Synthes, Inc.	22,765.64	4/18/11	Common stock and cash	Unit <sup>53</sup>	No	Yes	Yes	No

<sup>51</sup> AT&T was to acquire from Deutsche Telekom all of the outstanding capital stock of T-Mobile in exchange for approximately \$39 billion, consisting of (i) \$25 billion in cash and (ii) approximately \$14 billion of AT&T common stock, subject to adjustment. The exact number of shares of common stock to be issued was to be determined prior to the closing based on the volume-weighted average of trading prices of AT&T common stock during the 30 trading days ending on the third business day prior to the closing, except that the volume-weighted average of the trading prices would not be deemed less than \$26.0165 or more than \$30.2354 for purposes of this formula. In addition, AT&T had the right to increase the cash portion of the purchase price by up to \$4.2 billion and decrease the number of shares of common stock to be issued based on the volume-weighted average price of common stock. On December 19, 2011, AT&T announced that AT&T and Deutsche Telekom had agreed to abandon the transaction after U.S. antitrust regulators announced their intention to oppose the deal.

<sup>52</sup> El Paso shareholders were given the option to receive (i) \$25.91 in cash and 0.64 common stock purchase warrants of Kinder, (ii) \$14.65 in cash, 0.419 Kinder common shares and 0.64 common stock purchase warrants of Kinder, or (iii) 0.964 Kinder common shares and 0.64 common stock purchase warrants of Kinder for each of their El Paso common shares subject to pro-ration with respect to the stock and cash portions so that approximately 57% of the aggregate merger consideration (excluding the warrants) were paid in cash and at least 43% (excluding the warrants) were paid in Kinder common stock. The aggregate deal value of approximately \$24.002 billion included the assumption of \$3.841 billion in debt from El Paso Pipeline Partners LP.

<sup>53</sup> Pursuant to the transaction terms, Synthes shareholders were entitled to receive a combination of CHF (Swiss Francs) 55.65 in cash and a number of shares of J&J common stock calculated based on the average of the volume weighted average trading prices of J&J common stock during the ten trading days ending two trading days prior to the effective time of the merger, as converted into Swiss Francs on each day in this valuation period, as provided by the formula set forth below. If such average of the volume weighted average trading prices was:

(i) between CHF 52.54 and CHF 60.45 per share, then Synthes shareholders would receive CHF 103.35 in shares (based on such average) of J&J common stock in exchange for each share of Synthes common stock;

(ii) greater than CHF 60.45, then Synthes shareholders would receive 1.7098 shares of J&J common stock in exchange for each share of Synthes common stock; or

(iii) less than CHF 52.54, Synthes shareholders would receive 1.9672 shares of J&J common stock in exchange for each share of Synthes common stock.

The ultimate calculation resulted in Synthes shareholders receiving 1.717 shares as the stock component for the transaction.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation, Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
6.	NASDAQ OMX Group Inc. and IntercontinentalExchange Inc.	NYSE Euronext	11,513.96	4/1/11	Common stock and cash <sup>54</sup>	Unit	Yes	No	No	No
7.	Deutsche Börse AG	NYSE Euronext	10,164.26	2/9/11	Common stock	--	Yes <sup>55</sup>	No	No	No
8.	Capital One Financial Corporation	ING Direct USA	8,875.93	6/16/11	Common stock and cash	Unit	Yes	No	No	No
9.	AMB Property Corporation	ProLogis	8,364.71	1/26/11	Common stock	--	Yes	No	No	No
10	Ecolab Inc.	Nalco Holding Company	8,111.84	7/20/11	Common stock and/or cash	Election, pro rata <sup>56</sup>	Yes	No	No	No
11.	Exelon Corporation	Constellation Energy Group, Inc.	7,840.11	4/28/11	Common stock	--	Yes	No	No	No
12.	Enscopl	Pride International, Inc.	7,306.40	2/7/11	Common stock and cash	Unit	Yes	No	No	No
13.	Alpha Natural Resources, Inc.	Massey Energy Company	7,165.24	1/29/11	Common stock and cash	Unit	Yes	No	No	No
14.	Ventas, Inc.	Nationwide Health Properties, Inc.	5,793.48	2/28/11	Common stock	--	Yes	No	No	No
15.	ITC Holdings Corp.	Entergy Corporation - Electric Transmission Business	5,575.29	12/5/11	Common stock	--	Yes	No	No	No

<sup>54</sup> In an attempt to “deal-jump” the previously announced NYSE/Deutsche Börse transaction (see footnote 55), on April 1, 2011, NASDAQ and IntercontinentalExchange offered to acquire all outstanding shares of NYSE for a combination of \$14.24 in cash, 0.4069 shares of NASDAQ stock and 0.1436 shares of IntercontinentalExchange stock per NYSE share. On May 16, 2011, NASDAQ and IntercontinentalExchange withdrew its offer to acquire NYSE.

<sup>55</sup> NYSE and Deutsche Börse entered into an agreement providing for a combination of their businesses under Holdco, a new Dutch holding company. Deutsche Börse’s business would be brought under the new holding company through an exchange offer and NYSE’s business would be brought under the new holding company through a merger. In the merger, each NYSE share would be entitled to receive 0.47 Holdco share. Upon completion of the combination, and assuming that all of the outstanding Deutsche Börse shares are exchanged in the exchange offer, former Deutsche Börse shareholders and former NYSE shareholders would own approximately 60% and 40%, respectively, of the outstanding Holdco shares. The merger was ultimately blocked by the European Commission in early 2012, on the grounds that it would effect a “near monopoly” in European exchange-traded derivatives.

<sup>56</sup> Nalco stockholders were entitled to elect to receive either 0.7005 shares of Ecolab common stock or \$38.80 in cash per share of Nalco common stock, provided that approximately 70% of the issued and outstanding shares of Nalco common stock immediately prior to the effective time converted into the right to receive Ecolab common stock and approximately 30% of the issued and outstanding shares of Nalco common stock immediately prior to the effective time converted into the right to receive cash. In order to achieve this 70%/30% stock–cash mix of consideration, the merger agreement provided for pro rata adjustments to and reallocation of the stock and cash elections made by Nalco stockholders.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
16.	Energy Transfer Equity, L.P.	Southern Union Company	5,560.76	6/16/11	Common stock and/or cash	Election, pro rata <sup>57</sup>	Yes	No	No	No
17.	Martin Marietta Materials, Inc.	Vulcan Materials Company <sup>58</sup>	4,740.90	12/12/11	Common stock	--	Yes	No	No	No
18.	Rock-Tenn Company	Smurfit-Stone Container Corporation	3,948.17	1/23/11	Common stock and cash	Unit	Yes	No	No	No
19.	Alleghany Corporation	Transatlantic Holdings, Inc.	3,685.58	11/21/11	Common stock and cash	Unit	Yes	No	No	No
20.	Validus Holdings, Ltd. <sup>59</sup>	Transatlantic Holdings, Inc.	3,458.02	7/12/11	Common stock and cash	Unit	Yes	No	No	No
21.	The PNC Financial Services Group, Inc.	RBC Bank (USA)	3,450.00	6/20/11	Common stock and/or cash, at the election of the acquiror <sup>60</sup>	Unit	No	Yes	Yes	No

<sup>57</sup> Southern Union stockholders could elect to receive, for each outstanding Southern Union share they hold, either \$44.25 in cash or 1.00 ETE common unit. This election was subject to the following limits:

- (i) 60% of the aggregate merger consideration would consist of cash; and
- (ii) the aggregate ETE common unit consideration could fluctuate between 40% and 50% of the aggregate merger consideration.

<sup>58</sup> Beginning in early 2010, Martin Marietta and Vulcan engaged in private negotiations regarding a potential friendly merger. But as Vulcan was unwilling to move towards a definitive agreement, on December 12, 2011, Martin Marietta delivered a proposal to Vulcan and commenced a hostile exchange offer to effect a business combination with Vulcan pursuant to which each outstanding share of Vulcan would be exchanged for 0.50 Martin Marietta shares (summarized in #17 of Annex H above). On December 22, 2011, the Vulcan board announced that it had unanimously determined to reject Martin Marietta's exchange offer and recommended to its shareholders to reject the offer; Martin Marietta responded that day with a press release reiterating its interest in acquiring the company. Martin Marietta's exchange offer remained open until May 14, 2012, when it terminated the exchange offer and withdrew the related registration statement as required by a decision rendered May 4 by the Delaware Chancery Court. The crucial finding in this Delaware decision, which Martin Marietta lost on appeal, was that in the course of its hostile takeover attempt, Martin Marietta failed to comply with confidentiality agreements struck during earlier friendly merger negotiations with Vulcan. As a result, Martin Marietta was enjoined from pursuing an acquisition of the company for four months, which injunction expired September 14, 2012. Despite some speculation that Martin Marietta may again resume friendly merger negotiations, no such deal has been announced.

<sup>59</sup> On June 12, 2011, Allied World Assurance Company Holdings, Ltd. and Transatlantic Holdings, Inc. agreed to a merger of equals transaction, with stockholders of Transatlantic receiving 0.88 Allied common stock for each Transatlantic share held (Allied and Transatlantic subsequently terminated the transaction on September 15, 2011). In an attempt to "deal-jump" this transaction, on July 12, 2011, Validus announced its unsolicited proposal to acquire all outstanding shares of Transatlantic in exchange for 1.5564 shares of Validus common stock and \$8.00 in cash pursuant to a one-time special dividend from Transatlantic for each share of Transatlantic common stock (Validus withdrew this offer on November 28, 2011). Transatlantic did not accept Validus' offer and subsequently entered into an agreement to be acquired by Alleghany Corporation, pursuant to which Transatlantic stockholders would receive 0.145 Alleghany common stock and \$14.22 in cash for each Transatlantic share held, as summarized in #19 of Annex H above.

<sup>60</sup> PNC, the acquiror, had the option to pay up to \$1.0 billion of the consideration in common stock (based on the volume-weighted average trading price of PNC common stock for each of the last 10 trading days immediately preceding the closing date), with the remainder of the purchase price to be paid in cash. In no event was the number of shares of PNC common stock, if any, issued to RBC to exceed either (i) \$1 billion worth of such shares (according to a weighted average valuation of such shares determined prior to closing) or (ii) 4.9% of the total number of shares of PNC common stock issued and outstanding immediately following the closing.

**Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2012**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	SoftBank Corp.	Sprint Nextel Corporation	20,140.00	10/15/2012	Common stock and/or cash <sup>61</sup>	Election, pro rata	Yes	No	No	No
2.	Eaton Corporation	Cooper Industries plc	11,460.74	5/21/2012	Common stock and cash <sup>62</sup>	Unit	Yes	No	No	No
3.	IntercontinentalExchange, Inc.	NYSE Euronext	8,052.28	12/20/2012	Common stock and / or cash	Election, pro rata <sup>63</sup>	Yes	No	No	No
4.	Freeport-McMoRan Copper & Gold Inc.	Plains Exploration & Production Company	6,450.39	12/5/2012	Common stock and /or cash	Election, equalizer, pro rata <sup>64</sup>	Yes	Yes	No	No
5.	Aetna Inc.	Coventry Health Care, Inc.	5,695.42	8/20/2012	Common stock and cash	Unit	Yes	No	No	No
6.	Energy Transfer Partners, L.P.	Sunoco, Inc.	5,260.68	4/30/2012	Common stock and / or cash <sup>65</sup>	Election, pro rata	Yes	No	No	No

<sup>61</sup> The SoftBank/Sprint transaction is notable in that the cash/stock election presented to Sprint shareholders represents a choice to exchange each Sprint share for either \$7.30 in cash or one share of common stock in a new publicly traded entity that is the successor to Sprint ("New Sprint") rather than stock in the acquiring company itself. Utilizing this consideration structure (subject to proration) will permit SoftBank to effect the purchase of a desired 70% stake in the equity of New Sprint using cash, with 30% of New Sprint's stock to remain outstanding (and, immediately after closing, held by current Sprint stockholders).

<sup>62</sup> This acquisition by Eaton of Cooper Industries employed a "double dummy" acquisition structure whereby the surviving entity would be incorporated in the target's country, Ireland. Under this approach, the acquiror (Eaton) created a holding company ("New Eaton") and two subsidiaries, then merged with one of the subsidiaries, its shareholders exchanging their stock in Eaton for stock in New Eaton. The target (Cooper) simultaneously merged into the other subsidiary of the holding company: Cooper shareholders exchanged each share of Cooper common stock for 0.77479 shares of New Eaton common stock and \$39.15 in cash.

<sup>63</sup> NYSE Euronext stockholders may elect to receive, for each NYSE Euronext share they hold, either (i) \$33.12 in cash, (ii) 0.2581 IntercontinentalExchange shares or (iii) \$11.27 in cash plus 0.1703 IntercontinentalExchange shares, subject to proration such that:

- (i) the maximum cash consideration is approximately \$2.7 billion; and
  - (ii) or the maximum aggregate number of shares is approximately 42.5 million.
- The overall mix of the merger consideration to be paid is approximately 67% shares and 33% cash.

<sup>64</sup> Plains Exploration shareholders may elect to receive, for each Plains Exploration share they hold,

- (i) \$25 in cash plus 0.6531 Freeport-McMoRan shares; OR
  - (ii) for each share of Plains Exploration share they hold, subject to proration whereby the value of cash and common shares will be equalized at closing:
    - (a) cash; or
    - (b) Freeport-McMoRan stock,
- such that the value of either the pure stock or pure cash consideration is equal to the value of the merger consideration outlined in (i) as of the closing of the merger.

<sup>65</sup> Shareholders of Sunoco could elect to receive (i) \$25 in cash plus 0.5245 Energy Transfer common units per Sunoco share (the "standard mix of consideration"), (ii) \$50 in cash per Sunoco share or (iii) 1.0490 Energy Transfer common units per Sunoco share. The election to receive pure cash or pure stock as consideration was subject to proration, such that the total amount of cash paid and the total number of common units issued in the merger would reflect the ratio that would have been effective had all Sunoco shareholders received the standard mix of consideration.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation, Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
7.	SXC Health Solutions, Corp.	Catalyst Health Solutions, Inc.	4,086.49	4/18/12	Common stock and cash	Unit	Yes	No	No	No
8.	M&T Bank Corporation	Hudson City Bancorp, Inc.	3,810.83	8/27/12	Common stock and / or cash	Election, pro rata <sup>66</sup>	Yes	No	No	No
9.	Eastman Chemical Company	Solutia Inc.	3,404.80	1/27/12	Common stock and cash	Unit	Yes	No	No	No
10	Chicago Bridge & Iron Company N.V.	The Shaw Group Inc.	3,133.19	7/30/12	Common stock and cash	Unit	Yes	No	No	No
11.	PVH Corp.	The Warnaco Group, Inc.	2,796.48	10/31/12	Common stock and cash	Unit	Yes	No	No	No
12.	ASML Holding N.V.	Cymer, Inc.	2,614.37	10/16/12	Common stock and cash	Unit	Yes	No	No	No
13.	Leucadia National Corporation	Jefferies Group, Inc.	2,561.04	11/12/12	Common stock <sup>67</sup>	--	Yes	No	No	No
14.	Realty Income Corporation	American Realty Capital Trust, Inc.	1,937.87	9/6/12	Common stock and cash <sup>68</sup>	Unit	Yes	No	No	No
15.	priceline.com Incorporated	KAYAK Software Corporation	1,805.56	11/8/12	Common stock and / or cash	Election, pro rata	No	Yes	Yes <sup>69</sup>	No
16.	NRG Energy, Inc.	GenOn Energy, Inc.	1,693.56	7/22/12	Common stock	--	Yes	No	No	No

<sup>66</sup> Pursuant to the merger agreement, Hudson City shareholders may elect to receive, for each Hudson City share of common stock, 0.08403 shares of M&T common stock or cash having a value equal to 0.08403 shares (calculated by multiplying the per share stock consideration by the average closing price of M&T common stock for the ten trading days immediately preceding the completion of the merger). These elections will additionally be prorated and adjusted such that in the aggregate approximately 60% of Hudson City's outstanding shares of common stock will be converted into the right to receive shares of M&T common stock and the balance (40%) into the right to receive cash consideration.

<sup>67</sup> In the merger, outstanding shares of Jefferies common stock will be exchanged for 0.81 Leucadia common shares. In addition, Jefferies' outstanding convertible debentures are to be convertible into common shares of Leucadia following the merger, giving effect to the 0.81 exchange ratio.

<sup>68</sup> Under the original Merger Agreement, each American Realty share would convert into 0.2874 Realty Income shares. The agreement was amended on January 6, 2013, to increase the consideration received per American Realty share: shareholders will now receive 0.2874 Realty Income common shares and \$0.35 in cash per share. Realty Income also announced that it intended to increase its annualized dividend to Realty Income stockholders by approximately \$0.35 per share once the merger has closed.

<sup>69</sup> KAYAK shareholders have the choice to receive \$40 in cash per KAYAK share, or a portion of a share of priceline.com that is determined by dividing \$40 by the aggregate volume weighted average price per share of priceline.com common stock for the 30 day trading period ending two days prior to the closing, provided that:

(i) if the average trading price is above \$698.32 per share, the pertinent exchange ratio will be 0.05728; and

(ii) if the average trading price is below \$571.35, then the exchange ratio will be 0.07001.

The cash/stock consideration will additionally be subject to proration such that the consideration will consist of 33% cash and 67% priceline stock.

**Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2013**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	Omnicom Group Inc. <sup>70</sup>	Publicis Groupe SA	16,695.14	7/28/13	Common stock <sup>71</sup>	--	Yes	No	No	No
2.	Liberty Global Inc.	Virgin Media Inc.	16,381.39	2/5/2013	Common stock and cash	Unit <sup>72</sup>	Yes	No	No	No
3.	Applied Materials, Inc. <sup>73</sup>	Tokyo Electron Ltd.	9,312.52	9/24/2013	Common stock	--	Yes	No	No	No
4.	American Realty Capital Properties, Inc.	Cole Real Estate Investments	6,952.60	10/23/2013	Common stock and/or cash	Election, pro rata <sup>74</sup>	Yes	No	No	No
5.	Community Health Systems, Inc. ("CHS")	Health Management Associates, Inc. ("HMA")	7,547.68	7/30/2013	Common stock, CVRs and cash <sup>75</sup>	Unit	Yes	No	No	No
6.	Regency Energy Partners LP	PVR Partners LP	5,512.68	10/10/2013	Common stock and cash	Unit	Yes	No	No	No
7.	Kinder Morgan Energy Partners, LP	Copano Energy LLC	5,422.54	1/29/2013	Common stock	--	Yes	No	No	No

<sup>70</sup> This transaction was terminated May 8, 2014.

<sup>71</sup> Under the terms of the Business Combination Agreement, each issued and outstanding share of Publicis will be exchanged for 1 share of Publicis Omnicom Group N.V. (the "NewCo"), while each issued and outstanding share of Omnicom will be exchanged for 0.813008 shares of NewCo, subject to adjustment for certain changes in outstanding shares and excluded asset values. In addition, shareholders of Publicis and Omnicom will receive special transaction dividends of €1.00 and \$2.00 per share, respectively, subject to adjustments.

<sup>72</sup> Shareholders of common stock of Virgin Media Inc. were entitled to receive a combination of cash, 0.2582 Class A Shares and 0.1928 Class C Shares of the new UK holding company ("UK Holdco") under the terms of the Merger Agreement. Liberty shareholders were entitled to receive an equivalent class and number of shares of UK Holdco to the shares that they held in Liberty Global Inc. prior to the merger. Note that Class A Shares in UK Holdco have one vote, Class B Shares (which would only be held by Liberty Global Inc. shareholders) have ten votes, and Class C Shares have no vote.

<sup>73</sup> This transaction was terminated April 27, 2014.

<sup>74</sup> Shareholders of Cole Real Estate Investments, Inc. were entitled to elect to receive either \$13.82 in cash or 1.0929 shares of the common stock of American Realty Capital Properties, Inc., provided that in no event would the aggregate consideration paid in cash be paid on more than 20% of the shares of Cole Real Estate Investments, Inc. issued and outstanding at the effective time. If the aggregate elections exceed 20%, then the amount of cash consideration to be paid would be reduced on a pro rata basis, with the remainder to be paid in American Realty Capital Properties, Inc. common stock.

<sup>75</sup> This transaction is interesting for its employment of Contingent Value Rights as part of the merger consideration. Under the terms of the merger agreement, each stockholder of HMA was entitled to receive (i) \$10.50 in cash, without interest, (ii) 0.06942 of a share of common stock, par value \$0.01 per share, of CHS and (iii) one contingent value right (each, a "CVR" and collectively, the "CVRs") issued by CHS subject to and in accordance with a CVR Agreement. Under the CVR Agreement, each holder of a CVR was entitled to receive a cash payment of \$1.00 per CVR, following and conditioned upon the final resolution of certain legal matters involving HMA. If the amount of certain specified losses (including attorneys' fees and expenses) arising out of or relating to the Existing Litigation exceeds \$18,000,000, the amount paid to the CVR holders would be reduced by \$0.90 for each dollar of losses in excess of \$18,000,000 (net of amounts recovered by CHS under insurance policies). Under the CVR Agreement, CHS undertakes to use its best efforts to list the CVRs on the NYSE, the NASDAQ, or another over-the-counter exchange.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation, Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
8.	Actavis Inc.	Warner Chilcott PLC	5,096.08	5/19/2013	Common stock	--	Yes	No	No	No
9.	Essex Property Trust Inc.	BRE Properties, Inc.	4,489.38	12/19/2013	Common stock and cash	Unit	Yes	No	No	No
10.	W.P. Carey Inc.	Corporate Property Associates 16 – Global Incorporated (“CPA 16”)	3,779.40	7/25/2013	Common stock	Unit	No	Yes	Yes <sup>76</sup>	No
11.	Fidelity National Financial Inc. (“FNF”)	Lender Processing Services Inc.	3,206.88	5/28/2013	Common Stock and cash	Unit	No	Yes	Yes <sup>77</sup>	Yes <sup>78</sup>
12.	AMR Corp.	US Airways Group, Inc.	3,080.00	2/14/2013	Common stock	--	Yes	No	No	No
13.	Linn Energy, LLC	Berry Petroleum Company	3,055.27	2/21/2013	Common stock	--	Yes	No	No	No
14.	KKR & Co LLP	KKR Financial Holdings LLC	2,609.42	12/16/2013	Common stock	--	Yes	No	No	No
15.	Pac West Bancorp.	Capital Source Inc.	2,281.83	7/22/2013	Common stock and cash	Unit	Yes	No	No	No
16.	Mid-America Apartment Communities Inc.	Colonial Properties Trust Inc.	2,178.14	6/3/2013	Common stock	--	Yes	No	No	No

<sup>76</sup> The exchange ratio of W.P. Carey common stock to be received by CPA 16 stockholders was to be determined at the closing and based upon a value of \$11.25 per share of CPA 16, divided by the volume weighted average trading price of W.P. Carey Common Stock for five consecutive trading days ending on the third trading day preceding the closing, but subject to a minimum exchange ratio of 0.1447 shares of W.P. Carey common stock and a maximum of 0.1842 shares of W.P. Carey common stock. At closing, the exchange ratio was 0.1830 shares of W.P. Carey common stock – within the range contemplated by the parties.

<sup>77</sup> The baseline merger consideration was a combination of \$16.625 in cash per share of Lender Processing Services Inc. and a fraction of a share of Class A common stock of FNF valued at \$15.749 per share, so long as the volume weighted average stock price (“VWAP”) of FNF Common Stock for the ten days preceding the closing of the merger is between \$20 and \$24.215. If the VWAP fell outside these ranges, the amount of FNF Common Stock to be paid to Lender Processing Services Inc. stockholders moved to specified fixed ratios representing a collar mechanism. In addition, if FNF was able to secure additional financing or had additional cash, it was entitled to elect to alter the consideration mix by increasing the cash consideration (and commensurately reducing the number of shares issued), unless the average FNF stock price was greater than \$26.763 for the ten days leading up to the closing.

<sup>78</sup> Under the Merger Agreement, if the VWAP was below \$20.00 at the time that all other conditions to closing were met, Lender Processing Services Inc. had the right to terminate the transaction.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
17.	American Realty Capital Properties, Inc. ("ARCP")	American Realty Capital Trust IV, Inc. ("ARCT")	2,163.86	7/2/2013	Common stock and cash	Election, pro rata	Yes <sup>79</sup>	Yes	Yes	No

<sup>79</sup> Under the Merger Agreement, each outstanding share of common stock of ARCT was entitled to receive (i) \$30.00 in cash, but in no event will the aggregate consideration paid in cash be paid on more than 25% of the shares of ARCT issued and outstanding as of immediately prior to the closing of the Merger or, in ARCP's discretion, (ii) either (A) a number of shares of ARCP's common stock equal to the Exchange Ratio (as defined below) or (B) only if the Market Price (as defined below) was less than \$14.94, 2.05 shares of ARCP's common stock and an amount in cash (the "Cash Portion of Alternative Stock Consideration") equal to the product obtained by multiplying the excess of the Exchange Ratio over 2.05 by the Market Price (collectively, the "Merger Consideration"). "Exchange Ratio" means (1) if the volume weighted average closing sale price of a share of ARCP's common stock over the five (5) consecutive trading days on the NASDAQ Global Select Market ending on the trading day immediately prior to the closing date, as reported in The Wall Street Journal (the "Market Price"), was equal to or greater than \$14.94, then 2.05, and (2) if the Market Price was less than \$14.94, then the quotient (rounded to the nearest one-hundredth) obtained by dividing \$30.62 by the Market Price. If the aggregate elections for payment in cash exceeded 25% of the number of shares of ARCT common stock issued and outstanding as of immediately prior to the closing of the Merger, then the amount of cash consideration paid on cash elections would be reduced on a pro rata basis with the remaining consideration paid in ARCP common stock and the Cash Portion of Alternative Stock Consideration, if applicable.



**Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2014<sup>80</sup>**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	Actavis PLC	Allergan, Inc.	68,445.40	11/17/2014	Common stock and cash	Unit	Yes	No	No	No
2.	AT&T Inc.	DirecTV Inc.	48,082.29	05/18/2014	Common stock and cash	Unit	No	Yes <sup>81</sup>	Yes	No
3.	Comcast Corp. <sup>82</sup>	Time Warner Cable Inc.	46,150.10	02/13/2014	Common stock	--	Yes	No	No	No
4.	Halliburton Company	Baker Hughes Incorporated	35,273.89	11/17/2014	Common stock and cash	Unit	Yes	No	No	No
5.	Actavis PLC	Forest Laboratories Inc.	25,106.61	02/18/2014	Common stock and/or cash	Election, pro rata <sup>83</sup>	Yes	No	No	No
6.	Reynolds American Inc.	Lorillard, Inc.	25,052.41	07/15/2014	Common stock and cash	Unit	Yes	No	No	No

<sup>80</sup> The plethora of transactions in 2014 meant that there were a number of sizeable deals that were below the value threshold meriting full specificity in this table, but which included interesting election or fixed value structures. These include: (i) Energy XXI (Bermuda) Limited's acquisition of EPL Oil & Gas Inc., announced on March 12, 2014 (stockholders entitled to elect between cash, common stock, or a combination of cash and common stock, subject to proration); (ii) Media General Inc.'s acquisition of LIN Media LLC, announced on March 21, 2014 (stockholders entitled to elect between cash and stock, subject to proration); (iii) Ventas Inc.'s acquisition of American Realty Capital Healthcare Trust, Inc., announced on June 2, 2014 (stockholders entitled to elect between cash and stock, subject to a cap on the cash election of 10% of the shares of American Realty Capital Healthcare Trust, Inc.'s common stock issued and outstanding immediately prior to closing and proration once this cap is met); (iv) Select Income REIT's acquisition of Cole Corporate Income Trust Inc., announced on September 2, 2014 (stockholders entitled to elect between cash and stock, subject to proration); (v) Alliance Data Systems Corp.'s acquisition of Conversant, Inc., announced on September 11, 2014 (fixed value, divided between \$18.20 per share of Alliance Data Systems Corp.'s stock and \$16.80 per share in cash); (vi) Endo International plc's acquisition of Auxilium Pharmaceuticals Inc., announced on October 9, 2014 (stockholders entitled to elect between cash, common stock, or a combination, subject to total cash consideration not exceeding 50% of the total equity value and total equity consideration not exceeding 75% of the total equity value, and proration if these caps are met); and (vii) Kindred Healthcare Inc.'s acquisition of Gentiva Health Services, Inc., announced on October 9, 2014 (fixed value; Gentiva stockholders will receive \$14.50 in cash plus \$5.00 of Kindred common stock per share, for a total of \$19.50 per share).

<sup>81</sup> Under the Merger Agreement, at closing each share of DirecTV common stock will be converted to the right to receive (i) \$28.50 in cash plus (ii) a number of shares of AT&T Inc. common stock equal to the exchange ratio. The exchange ratio is (i) if the average AT&T Inc. stock price for the thirty consecutive trading days ending on (and including) the trading day that is three trading days prior to closing (such price, the "Average Parent Stock Price") is an amount greater than \$38.577, 1.724, (ii) if the Average Parent Stock Price is an amount greater than or equal to \$34.903 but less than or equal to \$38.577, the quotient obtained by dividing \$66.50 by the Average Parent Stock Price, and (iii) if the Average Parent Stock Price is an amount less than \$34.903, 1.905.

<sup>82</sup> This transaction (and the related transaction between Comcast and Charter Communications) was terminated on April 24, 2015.

<sup>83</sup> The Merger Agreement provides that, upon completion of the merger, each share of Forest Laboratories Inc. common stock issued and outstanding be converted into the right to receive, at the election of the holder thereof: (1) a combination of \$26.04 in cash plus 0.3306 Actavis ordinary shares (the "Mixed Election Consideration"); (2) \$86.81 in cash (the "Cash Election Consideration"); or (3) 0.4723 Actavis ordinary shares (the "Stock Election Consideration"). Shares of Forest Laboratories Inc. common stock with respect to which no election is made will receive the Mixed Election Consideration. Stockholders who make the Cash Election or the Stock Election will be subject to proration to ensure that the total amount of cash paid and the total number of Actavis shares issued to Forest shareholders as a whole are equal to the total amount of cash and number of Actavis shares that would have been paid and issued if all Forest shareholders received the Mixed Election consideration.

	Acquiror	Target	Deal Value (\$ mill)	Date Announced	Consideration	Unit vs. Election, Allocation, Procedure	Fixed Exchange Ratio	Fixed Value	Cap/Collar	Walk-away
7.	Becton, Dickinson and Company	CareFusion Corporation	12,000.11	10/05/2014	Common stock and cash	Unit	Yes	No	No	No
8.	Wisconsin Energy Corporation	Integrus Energy Group, Inc.	9,046.96	06/23/2014	Common stock and cash	Unit	Yes	No	No	No
9.	Dollar Tree, Inc.	Family Dollar Stores, Inc.	8,528.84	07/28/2014	Common stock and cash	Unit	No	Yes <sup>84</sup>	Yes	No
10.	Access Midstream Partners, L.P..	Williams Partners, L.P.	7,862.66	06/15/2014	Common units	--	Yes <sup>85</sup>	No	No	No
11	Level 3 Communications, Inc.	TW Telecom, Inc.	7,262.09	06/16/2014	Common stock and cash	Unit	Yes	No	No	No
12.	Albemarle Corporation	Rockwood Holdings, Inc.	6,327.52	07/15/2014	Common stock and cash	Unit	Yes	No	No	No
13.	GTECH S.p.A.	International Game Technology	6,255.73	07/16/2014	Common stock and cash	Unit	No	Yes <sup>86</sup>	Yes <sup>87</sup>	No
14.	Laboratory Corporation of America Holdings	Covance Inc.	6,169.84	11/03/2014	Common stock and cash	Unit	Yes	No	No	No
15.	Mallinckrodt PLC	Questcor Pharmaceuticals, Inc.	5,592.21	04/07/2014	Common stock and cash	Unit	Yes	No	No	No
16.	Targa Resources Corp.	Atlas Energy, L.P.	4,977.75	10/13/2014	Common stock and cash	Unit	Yes	No	No	No

<sup>84</sup> Under the Merger Agreement, each share of Family Dollar Stores, Inc. common stock is automatically to be converted into the right to receive (a) \$59.60 in cash and (b) a fraction of a validly issued, fully paid and non-assessable share of Dollar Tree, Inc. common stock equal to the quotient (the "Exchange Ratio") determined by dividing (x) \$14.90 by (y) the volume weighted average price per share of Dollar Tree, Inc. common stock on NASDAQ for the twenty trading days beginning on the twenty-third trading day immediately preceding the closing date and concluding at the close of trading on the third trading day immediately preceding the closing date (such price, the "Dollar Tree Trading Price"), *provided* that if (i) the Dollar Tree Trading Price is greater than or equal to \$59.98, the Exchange Ratio shall be 0.2484, and (ii) if the Dollar Tree Trading Price is equal to or less than \$49.08, then the Exchange Ratio shall be 0.3036.

<sup>85</sup> This transaction featured different exchange ratios (both fixed) based on whether or not unitholders were affiliated with The Williams Companies, Inc. Unaffiliated unitholders' Common Units had the right to receive 0.86672 Common Units in the Buyer, while unitholders that were affiliated with the Williams Companies, Inc. were only entitled to receive 0.80036 Common Units in the Buyer.

<sup>86</sup> The cash consideration per share consists of \$13.69 less the special dividend amount attributable to such share. The stock consideration comprises an exchange ratio (the "Exchange Ratio") determined by dividing \$4.56 by the Acquiror's recent average share price (the "Acquiror Trading Price"), *provided, however*, that if such quotient is less than 0.1582, the exchange ratio shall be 0.1582, and if the quotient is greater than 0.1819, the exchange ratio shall be 0.1819. If, however, the Exchange Ratio without giving effect to the proviso in the previous sentence would have been greater than 0.1819 and less than or equal to 0.2140, the cash consideration will be increased by the amount that would result from multiplying the difference between the actual exchange ratio and 0.1819 by the Acquiror Share Price. In addition, if the Exchange Ratio without giving effect to the proviso in the previous sentence would have been greater than 0.2140, the cash consideration will be increased by an amount equal to the product of the Acquiror Share Price and 0.0321.

<sup>87</sup> Note the application of the cash top-up to the cap and collar, as discussed in the previous footnote.

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
17.	Enterprise Products Partners L.P.	Oiltanking Partners, L.P.	4,646.74	10/01/2014	Common units and cash <sup>88</sup>	Unit	Yes	No	No	No
18.	Washington Prime Group Inc.	Glimcher Realty Trust	4,304.75	09/16/2014	Common stock and cash	Unit	Yes	No	No	No
19.	NextEra Energy, Inc.	Hawaiian Electric Industries, Inc.	4,301.30	12/03/2014	Common stock <sup>89</sup>	--	Yes	No	No	No
20.	AECOM Technology Corporation	URS Corporation	3,886.21	07/13/2014	Common stock and cash	Election, equalizer, pro rata <sup>90</sup>	Yes	No	No	No
21.	Alliant Techsystems Inc.	Orbital Sciences Corporation	3,778.98	04/29/2014	Common stock	--	Yes	No	No	No
22.	Whiting Petroleum Corporation	Kodiak Oil & Gas Corp.	3,752.49	07/13/2014	Common stock	--	Yes	No	No	No
23.	C&J Energy Services Inc.	Nabors Inds-Completion & Production	2,860.00	06/25/2014	Common stock and cash	Unit	Yes	No	No	No
24.	Zillow, Inc.	Trulia, Inc.	2,779.33	07/28/2014	Common stock	--	Yes	No	No	No
25.	NetScout Systems Inc.	Danaher Corp-Common Bus.	2,619.38	10/13/2014	Common stock	--	Yes	No	No	No
26.	BB&T Corporation	Susquehanna Bancshares Inc.	2,492.04	11/12/2014	Common stock and cash	Unit	Yes	No	No	No

<sup>88</sup> Note that this was the first step of a two-step transaction, representing the acquisition of the general partner of Oiltanking Partners, L.P. On November 15, 2014, the entities announced the second step of the transaction (namely the acquisition of the limited partner units by the acquiror in a unit-for-unit transaction).

<sup>89</sup> Although this is a common stock merger, stockholders in Target also receive the benefit of a special cash dividend and a spin-off of the stock of a bank holding company subsidiary of the Target.

<sup>90</sup> Under the Merger Agreement, each share of Target stock is entitled to elect to receive the "Per Share Amount" in either cash or stock. The "Per Share Amount" is (i) \$33.00 plus the product, to the nearest tenth of a cent, of 0.734 times the average closing price of Acquiror's closing sales price on the NYSE for the five (5) trading days immediately preceding the closing date (such average closing price, the "Parent Closing Price") divided by (ii) the Parent Closing Price. The value of each election is intended to be the same based on an equalizer method. Elections between cash and stock are subject to proration if more than a fixed amount of cash would be paid or more than a fixed number of shares would be issued if all elections are given effect.

**Pricing Formulas and Forms of Consideration: Selected Stock for Stock and Mixed Consideration Transactions Announced in 2015**

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
1.	Allergan plc.	Pfizer Inc.	139,500.00	11/22/2015	Common stock or cash	Election, “quasi equalizer”, pro rata <sup>91</sup>	Yes	No	No	No
2.	Dell Inc.	EMC Corporation.	65,999.00	10/12/2015	Common stock and cash <sup>92</sup>	Unit	Yes	No	No	No
3.	The Dow Chemical Co.	DuPont	62,111.06	12/11/2015	Common stock	--	Yes	No	No	No
4.	Charter Communications Inc.	Time Warner Cable Inc.	55,637.58	05/26/2015	Common stock and cash	Election of Units <sup>93</sup>	Yes	No	No	No
5.	Anthem Inc.	Cigna Corp.	49,383.20	06/20/2015	Common stock and cash	Unit	Yes	No	No	No
6.	HJ Heinz Company	Kraft Foods Group, Inc.	46,105.54	03/25/2015	Common stock and cash <sup>94</sup>	Unit	Yes	No	No	No
7.	Avago Technologies Limited	Broadcom Corporation	37,849.31	05/28/2015	Common stock or cash	Election, equalizer pro rata <sup>95</sup>	Yes	No	No	No
8.	Energy Transfer Corp L.P.	The Williams Companies, Inc.	37,000.00	09/28/2015	Common stock or cash	Election, pro rata <sup>96</sup>	Yes	No	No	No

<sup>91</sup> This transaction is structured as an acquisition of Pfizer pursuant to which the Pfizer stockholders will have the right to elect to receive as merger consideration for each share of Pfizer stock: 1 share of Allergan or a cash amount equal to the volume weighted average trading price of Pfizer common stock on the day before closing. In no event the cash consideration shall be less than \$6 billion or exceed \$12 billion, with elections subject to proration to ensure the aggregate cash consideration is within this range.

<sup>92</sup> Dell is issuing to EMC stockholders a new class of common stock of Dell (the “Class V Common Stock”) intended to track an economic interest in the VMware business. EMC owns over 80% of VMware. In the merger, each EMC share will be converted into (i) a number of shares of Class V Common Stock equal to 222,966,450 divided by the aggregate number of EMC shares issued and outstanding immediately prior to the Effective Time and (ii) \$24.05 in cash.

<sup>93</sup> Time Warner shareholders will have the right to elect to receive for each Time Warner share (i) \$100.00 in cash and a number of shares of a newly formed holding company (“New Charter”) equal to 0.5409 multiplied by the Parent Merger Exchange Ratio or (ii) \$115.00 in cash and a number of New Charter shares equal to 0.4562 multiplied by the Parent Merger Exchange Ratio. The election is not subject to proration. At the closing, each Charter share will be exchanged for a number of New Charter shares equal to the Parent Merger Exchange Ratio. The Parent Merger Exchange Ratio is equal to 0.9042.

<sup>94</sup> Each Kraft share will be converted into the right to receive one Heinz share, which are to be listed on either the NYSE or NASDAQ upon closing. In addition, Kraft will declare a special cash dividend equal to \$16.50 per share of Kraft common stock to shareholders of Kraft as of a record date immediately prior to the closing of the merger.

<sup>95</sup> Broadcom stockholders will have the right to elect to receive for each Broadcom share (i) \$54.50 in cash; (ii) 0.4378 ordinary shares of a newly formed Singapore holding company (“Holdco”); or (iii) either 0.4378 units of a newly formed limited partnership or 0.4378 restricted shares in Holdco (with restricted shares to be issued in the event an IRS ruling is obtained and units to be issued otherwise), with the elections in (i) and (ii) above subject to proration so that the total consideration will be 50% cash and 50% equity, assuming that less than half of the Broadcom shares elect option (iii).

<sup>96</sup> Williams’ stockholders will have the right to elect to receive for each Williams’ share (i) 1.8716 shares of a newly formed “TopCo” holding company, with each share having attached to it one contingent consideration right, (ii) \$8.00 in cash and 1.5274 shares of TopCo, with each share having attached to it one contingent consideration right which or (iii) \$43.50 in cash, subject to proration to ensure that the aggregate cash

	<b>Acquiror</b>	<b>Target</b>	<b>Deal Value (\$ mill)</b>	<b>Date Announced</b>	<b>Consideration</b>	<b>Unit vs. Election, Allocation Procedure</b>	<b>Fixed Exchange Ratio</b>	<b>Fixed Value</b>	<b>Cap/Collar</b>	<b>Walk-away</b>
9.	Aetna Inc.	Humana Inc.	34,580.27	07/03/2015	Common stock and cash	Unit	Yes	No	No	No
10.	ACE Ltd.	Chubb Corp.	28,533.58	07/01/2015	Common stock and cash	Unit	Yes	No	No	No
11.	Energy Transfer Partners LP	Regency Energy Partners L.P.	18,447.90	01/26/2015	Common stock and cash <sup>97</sup>	Unit	Yes	No	No	No
12.	Western Digital Corp.	SanDisk Corp.	17,791.35	10/21/2015	Common stock and cash <sup>98</sup>	Unit	Yes	No	No	No
13.	MPLX L.P.	MarkWest Energy Partners L.P.	15,400.00	07/13/2015	Common stock and cash	Unit	Yes	No	No	No
14.	Newell Rubbermaid Inc.	Jarden Corp.	15,435.14	12/14/2015	Common stock and cash	Unit	Yes	No	No	No
15.	Schlumberger Limited	Cameron International Corp.	13,186.12	08/26/2015	Common stock and cash	Unit	Yes	No	No	No
16.	Marriott International, Inc.	Starwood Hotels & Resorts Worldwide, Inc.	11,755.52	11/16/2015	Common stock and cash	Unit	Yes	No	No	No
17.	NXP Semiconductors NV	Freescale Semiconductor Ltd.	11,224.29	03/02/2015	Common stock and cash	Unit	Yes	No	No	No
18.	Alexion Pharmaceuticals Inc.	Synageva BioPharma Corp.	8,394.26	03/02/2015	Common stock and cash	Unit	Yes	No	No	No
19.	MeadWestvaco Corp.	Rock-Tenn Co.	8,143.26	01/26/2015	Common stock and Cash	Election, equalizer, pro rata <sup>99</sup>	Yes	No	No	No

consideration does not exceed an amount equal to the product of the total number of Williams shares outstanding at the closing multiplied by \$8. If all Williams' stockholders elect to receive all cash or all stock, then each share of Williams common stock would receive \$8.00 in cash and 1.5274 ETC common shares. In addition, Williams' stockholders will be entitled to a special one-time dividend of \$0.10 per Williams' share to be paid immediately prior to the closing of the transaction.

<sup>97</sup> The original merger agreement provided that each limited partnership unit of Regency Energy Partners was to receive 0.4066 limited partnership units of Energy Transfer Partners and \$0.32 in cash (which cash payment was intended to reflect the difference between Regency's quarterly cash distribution and ETP's quarterly cash distributions for one year following the closing). On February 18, 2015 the merger agreement was amended such that each limited partnership unit of Regency Energy Partners is to receive 0.4066 limited partnership units of Energy Transfer Partners plus a number of additional limited partnership units of Energy Transfer Partners equal to \$0.32 divided by the lesser of (i) the volume weighted average trading price of the ETP units on the NYSE for the five trading days ending on the third trading day immediately preceding the closing and (ii) the closing price of the ETP units on the NYSE on the third trading day immediately preceding the closing.

<sup>98</sup> The merger agreement provided that in the event the previously announced \$3.775 billion equity investment in Western Digital by Unisplendour Corporation had not closed or was terminated, the merger consideration for each share in SanDisk would change from (i) \$85.10 in cash and 0.0176 shares of Western Digital to (ii) \$67.50 in cash and 0.2387 share of Western Digital. On February 23, 2016, Unisplendour terminated its investment agreement with Western Digital after the Committee on Foreign Investment in the United States decided to conduct an investigation into the proposed transaction, resulting in SanDisk shareholders becoming entitled to receive the alternate merger consideration.

<sup>99</sup> Rock-Tenn stockholders will have the right to elect to receive for each share of Rock-Tenn stock either (i) an amount in cash equal to the volume weighted average trading price per share of Rock-Tenn on the NYSE for the consecutive period over the five trading days immediately preceding (but not including) the third trading day prior to closing or (ii) one share of a newly formed TopCo holding company, with proration to

Acquiror	Target	Deal Value (\$ mill)	Date Announced	Consideration	Unit vs. Election, Allocation Procedure	Fixed Exchange Ratio	Fixed Value	Cap/Collar	Walk-away
20. Willis Group Holdings Limited	Towers Watson & Co.	8,353.06	06/30/2015	Common stock	--	Yes	No	No	No
21. Staples Inc.	Office Depot Inc.	6,306.14	02/04/2015	Common stock and cash	Unit	Yes	No	No	No
22. Royal Bank of Canada	City National Corp	5,100.00	01/22/2015	Common stock and cash	Election, equalizer, pro rata <sup>100</sup>	Yes	No	No	No

ensure that Rock-Tenn stockholders receive 49.9% of the issued and outstanding shares of TopCo (provided that if either party reasonably determines that such stock percentage is not consistent with the intended tax treatment of the transaction, the 49.9% may be reduced by either party, but not to a percentage lower than 49.5%).

<sup>100</sup> For each share of City National, City National stockholders can elect to receive either cash consideration or shares of Royal Bank of Canada, subject to proration. If cash consideration is elected, such share will be exchanged for an amount in cash equal to the "Per Share Amount" and if stock consideration is elected, such share will be exchanged for a number of RBC common shares equal to the "Per Share Amount" divided by the volume-weighted average trading price of RBC common shares for the ten trading day period preceding closing. The Per Share Amount is calculated by dividing the "Closing Transaction Value" by the number of City National shares outstanding at closing. Subject to certain adjustments and limitations as set forth in the Merger Agreement, the Closing Transaction Value will be the aggregate deal value, calculated by adding (1) the aggregate cash to be paid in the transaction (\$94.50 multiplied by 50% of the currently outstanding City National shares, as increased by shares permitted to be issued following signing of the merger agreement) plus (2) the aggregate number of RBC common shares to be issued in the transaction (41,358,212, as increased based on increases in City National shares permitted to be issued following signing of the merger agreement and decreased by shares of City National, if any, cancelled in connection with the merger) multiplied by the volume weighted average trading price of RBC common shares for the ten trading days preceding closing.