MERGER & CONSOLIDATION: OVERVIEW

- **Merger:** A contractual and statutory process by:

  1. which one corporation (the *surviving corporation*) acquires all of the assets and liabilities of another corporation (the *merged corporation*),
  2. causing the merged corporation to become defunct.
  3. As part of the merger process, the shareholders of the merged corporation receive (i) payment for their shares and/or (ii) shares in the surviving corporation.

- **Consolidation:** A contractual and statutory process by which:

  1. two or more corporations join to become a completely new corporation (the *successor corporation*),
  2. the original corporations cease to exist and to do business, and
  3. the successor corporation acquires all of the assets and liabilities of the original (now defunct) corporations.
MERGER & CONSOLIDATION: PROCEDURE

Any merger or consolidation is governed by the laws of one (or more) of the states, each of which sets forth its own procedural requirements. However, in general:

(1) The boards of directors of each (original) corporation involved in the proposed transaction must approve the merger or consolidation plan;

(2) The shareholders of each (original) corporation involved in the proposed transaction must, thereafter, approve the merger or consolidation plan by vote at a called or scheduled shareholders’ meeting;

(3) The approved plan must be filed with the appropriate state official(s); and

(4) Once all state-law formalities have been satisfied, the state will issue, as appropriate, a certificate of merger to the surviving corporation or a certificate of consolidation to the successor corporation.

(5) When a parent corporation merges with an at least 90% owned subsidiary, then a short form merger can be accomplished without shareholder approval.
MERGER & CONSOLIDATION: SHAREHOLDERS’ RIGHTS

- While the day-to-day operations of a corporation, and even the policies governing its ongoing operations, are generally left to the corporation’s officers and directors, any “extraordinary” matter -- such as a merger or consolidation -- must be approved by the corporation’s shareholders.

- If the necessary majority of the corporation’s shareholders approve a merger or consolidation, it will go forward, and the shareholders will be compensated as discussed. However, no shareholder who votes against the transaction is required to accept shares in the surviving or successor corporation. Instead, he or she may exercise appraisal rights.

  - **Appraisal Right:** The right, created by state law, of a dissenting shareholder who objects to an extraordinary transaction (such as a merger or consolidation):

    (i) to have his or her shares of the pre-merger or pre-consolidation corporation appraised, and

    (ii) to be paid the fair market value of his or her shares by the pre-merger or pre-consolidation corporation.
ASSET PURCHASE

When a corporation acquires all or substantially all of the assets of another corporation, by direct purchase, the purchasing (or acquiring) corporation simply extends its ownership and control over the additional assets.

The acquiring corporation does not need shareholder approval unless the purchase is to be paid for with stock and the acquiring corporation must issue additional shares to make the purchase, in which case its shareholders must approve the additional shares.

Generally, the acquiring corporation only purchases the assets, not the liabilities, of the other corporation. However, there are exceptions when:

(i) the acquiring corporation impliedly or expressly assumes the seller’s liabilities;

(ii) the sale is a de facto merger or consolidation;

(iii) the acquiring corporation continues the seller’s business and retains the same personnel; or

(iv) the sale is fraudulently executed in an effort to avoid liability.
STOCK PURCHASE

- **Stock Purchase**: The purchase of a sufficient number of **voting** shares of a corporation’s stock, enabling the acquiring corporation to exercise **control** over the **target corporation**.

- A stock purchase is generally facilitated by a **tender offer** to the target corporation’s shareholders. The tender offer is **publicly advertised**, available to all shareholders, and offers to pay a higher-than-market price for shares of the target corporation.

- **Exchange Tender Offer**: An offer to give shares in the acquiring corporation in exchange for shares in the target corporation.

- **Cash Tender Offer**: An offer to pay cash in exchange for shares of the target corporation.

- A tender offer may be **conditioned** on receiving a specified number of outstanding shares in the target corporation by a specified date.

- The **terms** and **duration** of, and the **circumstances** underlying, a tender offer are strictly regulated by federal securities laws. In addition, most states impose additional regulations on tender offers.
TAKEOVER DEFENSES

Sometimes a targeted company wants to resist a takeover attempt. The targeted company may adopt one or more of the following takeover defenses:

- **Crown Jewel**: selling the company’s most valuable assets.
- **Golden Parachute**: high severance packages for top management.
- **Poison Pill**: stockholders have the right to purchase additional shares at a low price.
- **Pac-Man**: the targeted company turns around and attempts to takeover the acquiring company.
- **White Knight**: the targeted company solicits a merger with another company, which makes a better tender offer to the target’s shareholders.
- **Shark repellent**: by-laws are amended to require that a large number of shareholders approve the firm’s combination.
- **Greenmail**: the targeted company offers a higher price to repurchase the stock that the acquiring company bought.
TERMINATION

■ **Dissolution:** The formal disbanding of a corporation, which may occur by:

(1) an *act of the legislature* in the state of incorporation,

(2) *voluntary approval* by the corporation’s shareholders and directors,

(3) *unanimous action* by all shareholders,

(4) *expiration* of the time period set forth in the certificate of incorporation, or

(5) *court order*.

■ **Liquidation:** The process by which corporate assets are converted into cash and distributed among creditors and shareholders according to specific rules of preference.