

Managing Securities Law Disclosures in Each Stage of the Deal

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Disclosure issues often affect the course of a deal.

- *Deal breakers:* Leaks of information regarding deal negotiations can derail a deal by pushing up the target's stock price, and shareholder litigation of disclosures can delay closing.
- *Deal drivers:* On the other hand, public disclosure can drive a deal by giving other bidders an opportunity to put in competing offers.

Disclosure issues are relevant in merger and acquisition transactions not only for public companies but also for any private companies that negotiate transactions with public companies. In addition, insiders who are involved in the deals, who are responsible for preparing public disclosures or investor communications, or who have access to information about the deal, monitor events and actions that may trigger disclosure obligations at each stage of a transaction.

Negotiations

Early in the negotiations, the parties consider when the negotiations of a potentially material transaction must be disclosed. In this context, materiality is fact-specific and depends on both the probability that a transaction will occur and the significance of the transaction to the company. As a general rule, federal securities laws do not require parties to publicly disclose ongoing deal negotiations, even if the negotiations are material, until the parties reach agreement. However, immediate disclosure of an impending material transaction may result in the following circumstances:

- *Denials:* If the company makes a public statement on the topic of mergers or acquisitions, it must speak truthfully. For example, it would be misleading for a company engaged in merger negotiations to deny that merger negotiations are going on.
- *Other public statements.* If the company makes a public statement that relates to the deal or the company's strategies, the company may disclose the negotiations to avoid any material misstatements

or omissions in its public statements. General comments about the company's ongoing business may be permitted even if ongoing merger negotiations have become material, but any public statements warrant a case-by-case review with the advice of counsel.

- *Trading by insiders:* A company may disclose material nonpublic information to end a blackout period and allow insiders to trade in company securities. In most cases, the company temporarily shuts down any stock repurchase program or trading by insiders before (and for some time after) the deal is announced.
- *Public offering:* If the company files a registration statement or other offering documents, affirmative disclosure requirements (perhaps including pro forma financial information) may apply, especially if the company considers the transaction to be probable at the time of the filing.
- *Selective disclosure (Regulation FD):* Unusual market activity may trigger a requirement for immediate public disclosure, particularly if the company knows or has reason to believe that trading is based on inadvertent selective disclosures of material nonpublic information by the company or its insiders.
- *Market rumors:* Unusual market activity may trigger a requirement to disclose under applicable stock exchange rules. The NYSE requires listed companies to make a public announcement if rumors or unusual market activity indicate that information on impending developments has leaked. Nasdaq requires listed companies to take appropriate corrective action if rumors or unusual market activity indicate that information on impending developments has become known to the investing public. To meet exchange requirements, a company may issue a public announcement as to the state of negotiations or development of the company's plans.

- *No comment:* In the absence of a duty to disclose, a company usually follows a policy of silence (or makes a “no comment” statement) in response to questions about merger discussions. In addition, to prevent leaks, the company directs all market and media inquiries on potential transactions or other corporate developments to a designated company spokesperson, and limits the group involved in preliminary deal negotiations to a small group of senior executives.

Signing and Announcement

If a public company enters into a material definitive agreement, it must disclose the material terms of that agreement.

- *Current report (Form 8-K):* The company discloses a material definitive agreement on Form 8-K within 4 business days, and a copy of the agreement must be filed with the next periodic report. In practice, however, most companies file the agreement on Form 8-K within a day or two because analysts and investors ask for details regarding the agreement and the company is prohibited under selective disclosure rules (Regulation FD) from discussing any information that was not publicly disclosed.
- *Investor call:* Typically the parties hold a conference call with investors and analysts on the morning of announcement. A Form 8-K with the press release and slide presentation is filed before the market opens, to be available during the call. The company also files a transcript of the call with the SEC.
- *Q&A and scripts:* Conference calls or meetings with employees often follow that afternoon and occur periodically until closing, again with written materials such as Q&A sheets. These talking points are filed with the SEC.

Between Signing and Closing

Merger and acquisition agreements typically contain provisions regarding public announcements and release of information in the period between signing and closing of the transaction. The parties coordinate their public communications, and may make joint announcements or hold joint conference calls. In addition:

- *Background of the merger:* In a stock merger, or if one or both parties will solicit a shareholder vote, the proxy statement (or joint proxy statement/prospectus) filed with the SEC includes in-depth disclosures regarding the acquirer and the target company. In addition, the proxy statement discloses the background of the transaction, including a day-by-day description of the negotiations. Ideally, someone in the organization, such as in-house counsel, maintains a basic log of every meeting and communication to prepare for this disclosure, keeping in mind that the log will be discoverable in litigation. Early meetings and discussions, even before the board of directors has been informed, become public once the disclosure has been filed.
- *Same-day filings:* Following announcement of a deal and before filing the registration statement and/or proxy statement, the companies must file any written communications regarding the deal with the SEC on the date of first use. Written communications include webcasts if the recordings are available on the company's website, as well as communications made to employees, customers or other parties.
- *Policies to avoid selective disclosure:* Special care should be taken during this period to ensure that material, non-public information regarding the deal is not selectively disclosed to certain investors or analysts.

Closing/Post-Closing

The company discloses the closing of the transaction on Form 8-K, and also reassesses disclosures to reflect the transaction and any related changes to the business or financial condition of the company in its SEC filings. In addition, the company discusses material changes in previously reported information.

- *Closing:* The closing of the transaction may require disclosures under several of the items in Form 8-K, including but not limited to:
 - completion of acquisition or disposition of assets;
 - material modification to rights of security holders;
 - changes in control of registrant; and
 - appointment or resignation of directors and executive officers.
- *Updated risk factors:* Many companies modify and improve upon their risk factors to reflect new risks facing the combined company, including downside risks relating to the acquisition and post-closing integration. The deal may require revised or even new risk factors in a party's periodic reports, perhaps even in a Form 10-K or Form 10-Q that is filed before closing, in order to disclose risks relating to the pending transaction or the other company's business.
- *SEC review:* An acquisition may involve SEC "hot topics," such as loss contingencies, which have been the subject of recent SEC comments. For example, if the acquired business has increased exposure to pending legal proceedings, risk factors should be updated accordingly.
- *Trends and uncertainties:* Companies update their disclosures in Management's Discussion and Analysis (MD&A) to reflect the transaction and the acquired or disposed business, including known trends, events, demands, commitments and uncertainties that are

reasonably likely to have a material effect on financial condition or operating performance of the combined company. MD&A informs investors that reported financial information is not necessarily indicative of future operating performance or of future financial condition of the combined company.

- *Forward-looking information and cautionary statements:* After closing, the company reviews and updates the cautionary statements that accompany forward-looking statements in its SEC filings to identify any important factors that could cause actual results to differ materially. A merger, acquisition or disposition may change underlying risks and require companies to revise the cautionary language based on new circumstances and information.

Conclusion

Companies determine what information to publicly disclose about a pending transaction, and when such disclosures should be made, after considering all of the relevant facts and circumstances. Such determinations are fact-intensive, and disclosure obligations may arise from many sources other than federal securities laws, such as state law, stock exchange requirements and regulations that govern the industry in which the company operates.

Disclosure requirements and decisions can affect timing, financial terms and closing risk of a deal. Parties seek to stay on track while ensuring compliance with disclosure requirements at each stage of the deal.

A Modern Corporate Practice

Business built America. Being your own boss and serving your customers well was the American Dream. You opened your doors and hung your sign. Business was simple. And now it's not. Concrete or virtual? Domestic or international? Public or private? Expansion or contraction? Facebook or Twitter? We operate in a world of stiff competition and even stricter regulation. Companies of all sizes are operating domestically and internationally, facing laws and regulations that span borders and boundaries, languages and cultures. Reach, size and demand have gone global. Andrews Kurth's team of more than 100 corporate lawyers, spread across all eight of our international offices, are helping clients define their companies, stake their claim in the world market and serve their investors without alienating their customers.

The Andrews Kurth Corporate Practice:

- Works closely with Fortune 500 companies and emerging growth companies alike, carefully balancing business objectives with regulatory compliance and corporate governance requirements.
- Helps clients devise and implement long-term development cycle strategies, from mergers and acquisitions, IPOs, stock and asset purchases, tender offers and proxy fights to exit strategies, auctions and spin-offs.
- Provided representation in nearly 400 business combinations with an aggregate value of more than \$142 billion.
- Serves as counsel to more than 215 public companies in corporate and securities law.
- Offers significant experience with the structure, finance and development of energy projects, both traditional and alternative, around the world.

- Participated in third largest IPO in U.S. history, as ranked by *The Deal* magazine's Deals of the Year, February 2011.

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Donna's practice has involved negotiating mergers and acquisitions of both public and private companies, representing underwriters and issuers in public offerings and private placements of equity and debt securities, and advising clients on a variety of corporate and securities laws matters. She has worked on transactions and with clients in a broad spectrum of businesses, including the energy, telecommunications, shipping, healthcare and other industries. She received her J.D. in 1999 from Yale Law School and her B.A., *magna cum laude*, from Harvard University in 1996.



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