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Regulatory: Mergers and acquisitions and the duty to update

Projections often change between the proxy statement filing and the shareholder vote

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Ongoing litigation around recent acquisitions highlights the difficult disclosure decisions that public companies face, particularly with regard to the duty to update prior public disclosure in mergers and acquisitions.

In mergers and acquisitions, the difficult disclosure decision generally relates to new information about the target. When the acquirer files its proxy statement for the deal with the Securities and Exchange Commission, its expectations for the target company are based on information available at the time. The acquirer will share with investors the expected impact the deal will have on earnings and the acquirer as a whole. However, it is not uncommon for new information to surface about the target company, sometimes just days before shareholders are scheduled to vote on the proposed transaction. This changes the acquirer's projections on the impact of the transaction, making the acquirer's earlier statements in the proxy statement inaccurate.

So, the acquirer faces a decision on whether or not to update the prior disclosure in its proxy statement.

In analyzing whether or not the acquirer should update the disclosure, it should be noted that there are a few cases that support the idea that there is a narrow duty to update prior disclosure when the disclosure involves a company's originally expressed expectations regarding mergers, takeovers or liquidations. This conclusion stems from wording in the cases that suggests disclosure about such extraordinary events contains an implicit representation by the company that it will update the public with news of any significant changes related to the disclosure. So, at a minimum, extra care is merited when making decisions about whether or not to update disclosure related to mergers, takeovers or liquidations.

In general, a company only has a duty to update if

- The prior disclosure contained an implicit factual representation that remained "alive" in the minds of investors as a continuing representation
- Such prior disclosure had become materially misleading in light of subsequent events

In this regard, it is important to note that under existing law, a company has neither a specific obligation to disclose internal forecasts nor a general obligation to disclose all material information. So, in most cases, the implicit representation in a company's disclosure is that it was made reasonably and in good faith, and not that such disclosure will continue to hold true even as circumstances change.

A final factor to consider when deciding whether or not to update prior disclosure is how such a decision may be viewed in hindsight. In other words, a company should be certain it is comfortable with its analysis and can support its decision should it be subject to regulatory or judicial review.

In the end, the acquirer may be on solid legal ground if it decides not to update its disclosure in the proxy statement, but in hindsight it may appear to regulators and courts that the acquirer has taken an overly aggressive position. Time will tell how the courts come to view the current cases, and whether the courts' findings add new insight on the duty to update in the context of mergers and acquisitions.

About the Author

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