

DELVACCA PRESENTS

PUBLIC COMPANY MERGERS & ACQUISITIONS

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**STRADLEY
RONON**
ATTORNEYS AT LAW



Introduction

- **Public Company M&A Market Trends**
- **What's My Motivation?**
 - Buyer vs. Seller
- **Tender Offers Stage A Comeback**
- **Common “Headache” Areas**
 - Regulatory approvals; 3rd party consents
 - Activist shareholders
 - Increased M&A litigation – all deal sizes and types

Introduction

- **Today's Focus:**
 - 1933 Act and 1934 Act Applicability to M&A
 - Disclosure Obligations
 - Deal Structure Choices
 - All-Cash vs. All-Stock vs. Mixed Consideration M&A Transactions
 - Lurking State Law Issues
 - Public Company Seller vs. Private Company Seller

Some Basics – 1933 Act Issues

- **1933 Act applies to your M&A deal if part or all of the deal consideration consists of securities**
 - Registration required if no exemption is available
 - Public/Public deals – relying on a Section 4(2) or Regulation D exemption is not realistic
 - Public/Private deals – private placement exemption analysis like “normal” private placement for cash
 - Many Public/Private deals with all stock or mixed consideration are done as private placements with resale registration rights

Some Basics – 1934 Act Issues

- **Various 1934 Act provisions may apply regardless of the form of consideration**
 - Proxy Rules – depending on which party requires shareholder action and Public/Private status
 - Tender Offer Rules – depending on choice of deal structure and Public/Private status
 - Schedule 13D Reporting – depending on Public/Private status and shareholding amounts
 - Rule 13e-3 “Going Private” Rules – depending on Public/Private status and nature of deal participants

Some Basics – Not Just “Housekeeping”

- **Confidentiality Agreements**
 - Permitted disclosures, standstills and exclusivity
- **Letters of Intent**
 - What is/isn't binding
 - Avoiding triggering SEC disclosure obligations
 - Confidentiality provisions, standstills and exclusivity
- **Closing the Window**
 - Insider trading policies, share repurchases, etc.

Some Basics – Not Just “Housekeeping”

- **Knowing your (and their) Articles/
Certificate of Incorporation, Bylaws, etc.**
- **Keeping a record of events**
 - Meeting minutes
 - Timeline/contacts between the parties
 - Important for disclosure purposes as well as litigation defense purposes

Disclosure Issues – Generally

- **Where you are in the M&A process affects your disclosure obligations:**
 - Preliminary negotiations
 - Definitive agreement execution
 - After definitive agreement but prior to filing of SEC tender offer/proxy/registration documents
 - SEC tender offer/proxy/registration statement filing
 - After filing/clearance/effective date of tender offer/proxy/registration documents
 - Closing (and even post-Closing)

Disclosure Issues – Prior to Signing Definitive Agreement

- **Keeping preliminary negotiations confidential**
- **Does an LOI trigger a disclosure obligation?**
 - Form 8-K filing requirements – SEC’s view
- ***Basic v. Levinson* and the “no comment” approach**
- **What if you want to (or need to) disclose at this stage?**
 - Pre-offering/pre-tender offer/pre-proxy solicitation
SEC filings

Disclosure Issues – Upon Signing Definitive Agreement

- **Form 8-K**
 - “Materiality” for a Public/Public deal
 - “Materiality” for a Public/Private deal
- **Can you really wait 4 business days?**
- **Can you really wait to file the agreement as an exhibit?**

Disclosure Issues – Prior To The SEC “Transaction” Filing

- **Does communicating with shareholders before a registration statement and/or proxy materials and/or tender offer materials have been filed conflict with SEC rules?**
 - Rule 165, Rule 425 (“offering” issues)
 - Rule 14a-12 (“solicitation” issues for proxy solicitations and tender offers)
- **What are “offering” or “solicitation” materials?**
- **Anti-fraud rules still apply**

Disclosure Issues – The SEC “Transaction” Filing

- **Proxy statements and registration statements (whether Form S-4 or Form S-3) are filed in preliminary form – cannot be used immediately for soliciting proxies or offering securities**
- **Tender offer filings (Schedule TO for the Buyer and Schedule 14D-9 for the Target) are not filed in preliminary form – can (and are) used immediately for soliciting or recommending the tender offer**

Disclosure Issues – After SEC “Transaction” Filing

- **Same issues and same solution/approach as was the case before the filing of the registration statement or proxy materials**
 - Until a final prospectus/proxy statement or a definitive proxy statement is available, comply with Rule 165/Rule 425 and/or Rule 14a-12
- **Same issues but different solution/approach when the transaction is a tender offer**
 - Because the offer commences immediately on filing, all later communications are amendments

Disclosure Issues – Closing (and Post-Closing)

- **Closing**

- Form 8-K filings concerning completion of the transaction
- “Final” Schedule TO and Schedule 13E-3 filings

- **Post-Closing**

- Form S-3 Registration Statement (if registration rights were given in lieu of immediate registration)
- Form S-8 for assumed plans
- Forms 3 and 4 for new officers/directors
- Form 8-K with financial statements

Disclosure Issues – State Law

Disclosure Issues

- **Delaware – boards of directors have a fiduciary duty of full disclosure**
 - SEC disclosure standards/compliance is not necessarily dispositive
 - Plaintiff’s bar interest in “full disclosure” – disclosure “improvement” bounties

Public Buyer/Public Seller

- **Deal Structure Alternatives**
 - “Two Step” – Tender Offer plus Merger
 - “One Step” – Merger
 - Effect of Form of Consideration on Structure and SEC Filings
 - All cash: (i) Schedule TO/Schedule 14D-9/Proxy Statement (Two Step); or (ii) Proxy Statement (One Step)
 - All stock or mixed consideration: Form S-4 Registration Statement (combining Buyer’s Prospectus and Seller’s Proxy Statement)

Public Buyer/Public Seller

- **Factors Affecting Choice of Deal Structure**
 - Form of Consideration
 - Timing
 - SEC review
 - Buyer concern: interlopers
 - Seller concerns: closing and payment timing
 - Closing Conditions
 - Who “owns” the closing risks and when?
 - Buyer vs. Seller Viewpoints
 - Appendix A – Comparative Timeline

Public Buyer/Public Seller

- **Deal documents issues**
 - Three risk categories: (i) Completion risk; (ii) Fiduciary Duty risk; and (iii) Post-Closing risk
 - Completion risk allocation and deal structure
 - Tender Offer vs. Merger
 - Fiduciary Duty risks – tying together the deal documents, disclosure and the deliberative process
 - Post-Closing risk allocation – is it possible to allocate risk to the seller in a Public/Public deal?
 - Contingent Value Rights (CVRs)

Public Buyer/Public Seller

- **Deal documents issues**
 - Different approaches to reps and warranties
 - Primary reliance on public filings vs. full list of “standard” reps and warranties
 - All cash deal vs. all stock/mixed consideration deal
 - Handling sensitive information through the use of schedules
 - Can shareholders rely on the deal documents as company disclosure?

Public Buyer/Public Seller

- **Stock Exchange Issues**
 - Shareholder approval requirements
 - Disclosure obligations
 - Watching your trading market (the exchanges will, you should too)
 - FINRA inquiries relating to M&A transactions

Public Buyer/Private Seller

- **Deal Structure Alternatives**
 - “Two Step” – Not Typical
 - Stock Purchase – pros and cons of “unanimity”
 - One Step Merger – most common approach
 - Asset Purchase
- **Factors Affecting Choice of Deal Structure**
 - Timing/Form of Consideration
 - Standard Factors: Liability/Tax/Regulatory/
3rd Party Consents

Public Buyer/Private Seller

- **Effect of Form of Consideration on SEC Filings**
 - All cash
 - Maximum flexibility
 - Section 14 Proxy Statement (but only if Buyer needs shareholder approval, which is not typical)
 - All stock or mixed consideration
 - Either: (i) Form S-4 Registration Statement to register Buyer's stock offered to Seller's shareholders (Buyer's Prospectus plus *possibly* proxy solicitation materials); or (ii) Form S-3 Registration Statement (filed post-closing for resales of Buyer shares issued to Seller's shareholders under a private placement exemption under Section 4(2) or Regulation D)

Public Buyer/Private Seller

- **Special considerations in all stock or mixed consideration deals**
 - Immediately tradable shares (Form S-4) vs. registration rights (Form S-3)
 - What form of registration rights?
 - Immediate/tied to transaction or delayed?
 - Buyer's status may affect everyone's perspective
 - Lock-ups or other restrictions on transfer?

Public Buyer/Private Seller

- **Effect of Timing Considerations on Structure and SEC Filings**
 - SEC review
 - Buyer concerns: closing, amount of shares being resold
 - Seller concerns: closing, payment timing, ability to resell shares (in all stock or mixed consideration deals)

Public Buyer/Private Seller

- **Deal documents issues**
 - Three risk categories: (i) Completion risk; (ii) Fiduciary Duty risk; and (iii) Post-Closing risk
 - (i) Completion risk
 - Usually fewer issues than Public Buyer/Public Seller deals
 - (ii) Fiduciary Duty risks
 - Usually more manageable than Public Buyer/Public Seller deals, but fiduciary duty issues still exist for private companies

Public Buyer/Private Seller

- (iii) In Public Buyer/Private Seller deals, Post-Closing risk may have a number of different aspects
- Indemnification
 - Escrow/guarantees
 - Earnouts

Public Buyer/Private Seller

- **Deal documents issues**
 - Different approaches to reps and warranties
 - Primary reliance on public filings vs. full list of “standard” reps and warranties
 - All cash deal vs. all stock/mixed consideration deal impact scope of Buyer’s reps and warranties

Public Buyer/Private Seller

- **Stock Exchange Issues**
 - Shareholder approval requirements
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Going Private Transactions

- **What is a Going Private Transaction?**
 - Rule 13e-3's focus on “purposes” and “effects” of certain M&A transactions involving affiliates
 - Possible transactions triggering the rule:
 - Management-led buyout
 - PE sponsored buyout with management participation
 - Significant shareholder transactions
- **Why do we care?**
 - Increased disclosure requirements (“fairness”)
 - Increased scrutiny from SEC, courts, plaintiff's bar

Panel Biographies

Tom Hanley is a partner in Stradley Ronon's Business Department and co-chair of the firm's Publicly Held Companies Practice Group. He advises public and private companies on corporate and securities law issues, including capital-raising transactions, mergers and acquisitions, corporate governance, SEC compliance and corporate litigation. He has more than 25 years' experience working with small-, mid-, and large-cap companies in a variety of industries and has served as issuer's counsel in more than \$7.5 billion in equity and debt issuances and as seller's or acquirer's counsel in M&A transactions valued at more than \$12 billion.

Mr. Hanley regularly advises executive management, in-house counsel, boards of directors and board committees, and investors on stock exchange compliance, shareholder relations, takeover defenses, proxy contests/contested elections, state law fiduciary duty issues, and corporate governance and risk management issues. He also counsels clients regarding securities and state law fiduciary duty-based litigation and regulatory agency enforcement actions, including shareholder lawsuits, fraud-based claims and SEC investigations. He serves as a primary liaison between public company clients and SEC, NYSE and NASDAQ staffs on disclosure, governance, listing qualifications and interpretive issues.

He has authored numerous articles on issues and trends in securities law and corporate governance, has also appeared as a panelist and moderated programs sponsored by the American Bar Association and the District of Columbia Bar, and has taught in graduate and executive education programs at the University of Virginia's Darden Graduate School of Business, the Institute for U.S. Law and UCLA's Anderson School of Management.

Panel Biographies

Eric Schoenborn is a partner in the Business Practice Group and co-chair of the firm's Publicly Held Companies Practice Group. He represents a broad range of public and private companies in business transactions, finance matters, and corporate and securities regulatory compliance.

Mr. Schoenborn advises clients in connection with acquiring companies and raising capital via the sale of securities, including conducting public offerings under the Securities Act of 1933 and private placements under exempt offerings. He also regularly counsels publicly held companies with respect to ongoing compliance under federal securities laws, including the preparation and filing of periodic reports such as quarterly and annual reports and proxy statements under the Securities Exchange Act of 1934.

Mr. Schoenborn regularly advises clients regarding corporate governance matters, including compliance with the Dodd-Frank Act, Sarbanes-Oxley Act and stock market governance rules, including implementation of committee charters, codes of ethics, executive compensation programs and anti-takeover defenses.

In the transactional arena, he represents clients in preparing and negotiating a broad range of commercial contracts and in connection with mergers, acquisitions and divestitures of public and private companies.

Mr. Schoenborn has written numerous articles and served as a panelist for programs on securities law and related matters. He was also recommended as a leader in the Corporate/M&A practice area in New Jersey in *Chambers USA; America's Leading Lawyers for Business*.

Panel Biographies

Laurence Weilheimer was the Senior Vice President, General Counsel and Corporate Secretary of Tasty Baking Company until he left on Dec. 31, 2011 in connection with the acquisition of the company by Flowers Foods, Inc.

In his role, Mr. Weilheimer was responsible for all of the company's legal affairs including commercial and transactional negotiations and contracts, employment and labor issues, financings, litigation, SEC and regulatory compliance, intellectual property, corporate governance and real estate matters. During his tenure, he led negotiations for key transactions and relationships including, leases for the bakery and corporate offices at the Philadelphia Navy Yard, the sale of the former bakery and offices, agreements for purchases of key new bakery equipment and sport sponsorships. Mr. Weilheimer also was a key member of the team that conducted the sale process leading to the successful tender offer by, and merger with, Flowers Foods.

Prior to joining Tasty Baking Company in April 2006, he was Corporate Counsel – Business Development at the global management consulting firm of Towers, Perrin, Forster & Crosby, Inc. In that role Mr. Weilheimer had legal responsibility for all business development activities, both domestically and internationally. Mr. Weilheimer managed transactions including acquisitions, divestitures, strategic alliances, equity investments and joint marketing relationships. He also handled general corporate contracting, real estate matters and employment related issues.

Mr. Weilheimer started his legal career in 1990 at the law firm of Wolf, Block, Schorr and Solis-Cohen in Philadelphia where he represented corporate clients ranging from development stage ventures to national public corporations in transactions including asset and stock acquisitions, mergers, public and private offerings of securities, bank financings and formations and reorganizations of business entities.

Appendix A – Comparative Summary Timetable

Week	One Step – Merger	Two Step – Tender Offer Followed By Merger
1-2	<ul style="list-style-type: none"> • Merger Agreement finalized, executed and publicly announced; Form 8-K filed • Parties and advisors draft merger proxy and Schedule 13E-3 (if “going private” rules apply) • Target files preliminary merger proxy materials with SEC (plus Schedule 13E-3 if required) • SEC review process begins • No proxy card may be sent or votes collected until proxy materials have been cleared by SEC staff and definitive proxy materials have been filed/distributed 	<ul style="list-style-type: none"> • Merger Agreement finalized, executed and publicly announced; Form 8-K filed • Parties and advisors draft Schedule TO, Schedule 14D-9 and Schedule 13E-3 (if “going private” rules apply) • Acquirer files Schedule TO, Target files Schedule 14D-9 with SEC (plus Schedule 13E-3 if required) • SEC review process begins • Tender offer may commence immediately, tender offer materials may be sent immediately, and shareholders may tender shares immediately
4-6	<ul style="list-style-type: none"> • SEC comments received • Target files amended preliminary merger proxy materials • As above, no proxy card may be sent or votes collected at this point 	<ul style="list-style-type: none"> • SEC comments received • Acquirer files amended Schedule TO, Target files amended Schedule 14D-9 • As above, tender offer remains open, shareholders may tender – Offer may close after end of 20th Business Day from commencement
7-8	<ul style="list-style-type: none"> • Additional SEC comments received • Target files definitive merger proxy materials • Special meeting date set • Merger proxy statement delivered to Target shareholders • Proxy solicitation efforts begin and continue 	<ul style="list-style-type: none"> • Additional SEC comments received • Acquirer files amended Schedule TO, Target files amended Schedule 14D-9 • Tender Offer closes, Acquirer accepts tenders and pays for shares, 1st step closes • If Acquirer holds 90%+ of Target shares (through tender itself or exercise of “top-up” option), 2nd step merger may occur using “short form” merger statute, 2nd step merger closes, cashing out remaining Target shareholders
10-12	<ul style="list-style-type: none"> • Proxy solicitation efforts continue • Target special meeting held, shareholders approve • Merger closing occurs • Target shareholders submit certificates for payment 	<ul style="list-style-type: none"> • If Acquirer holds 90% or less of Target shares, proxy or information statement must be filed with SEC and distributed and shareholder meeting held to approve 2nd step merger – would result in delayed closing of 2nd step