Client Alert.

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Recent Cases Remind M&A Participants of When Disclosure of Merger Negotiations Is Required

By Spencer D. Klein and Michael G. O'Bryan

Two recent decisions by United States federal courts serve as useful reminders to companies and their advisors of the rules regarding disclosure of merger negotiations. While the cases do not enunciate new law, they do provide several useful illustrations of circumstances where disclosure is, and is not, required.

In both *Vladimir v. Bioenvision, Inc.*[1] and *Levie v. Sears Roebuck & Co.*,[2] stockholders of a target company who sold stock prior to the announcement of an acquisition agreement claimed that the company's failure to disclose the negotiations in advance of the actual signing violated, among other things, Rule 10b-5, particularly in the context of other disclosures made by the target during the relevant time period. They further claimed that, if the company had made timely disclosure, they either would not have sold, and thus would have received the benefit of the premium offered in the acquisitions, or would have received the additional value that would have been reflected in the target's stock price had the negotiations been disclosed.

As laid out by the lower court in *Vladimir*, and subsequently affirmed by the appeals court, the federal securities rules regarding disclosure of merger negotiations are as follows:

- A corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Disclosure is required only when the corporation is subject to a duty to disclose.
- There are three circumstances in which a duty to disclose arises:

  (1) when the rules of the Securities and Exchange Commission affirmatively require disclosure;

  (2) when a corporation or corporate insider trades on the basis of material, non-public information; and

  (3) when disclosure is required to make prior statements not misleading.
- No SEC rule requires disclosure of merger negotiations until they ripen into a definitive agreement, in which case a Current Report on Form 8-K is required.
- If, however, a company speaks about mergers or acquisitions or related topics, it must speak truthfully. So it could be materially misleading for a company to deny merger negotiations while negotiations are ongoing. But general statements about a company's business, financial projections or strategy do not give rise to a duty to disclose merger negotiations that might materially impact its business, projections or strategy. On the other hand, a statement that the company's business, projections or strategy will not change could result in a disclosure obligation.

[1] *Vladimir v. Bioenvision, Inc.*, No. 09-3487, 2010 WL 1337699 (2d Cir. April 7, 2010).

[2] *Levie v. Sears Roebuck & Co,*. 676 F. Supp. 2d 680 (D. Ill. 2009).

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- In the absence of a duty to disclose, silence (or a "no comment" statement) is an acceptable response to questions about merger discussions.

The opinions underscore the fact-specific nature of their conclusions. Decisions regarding when to disclose merger negotiations (or other steps preceding an acquisition) should be made in light of all the relevant circumstances, including other statements the company has made or intends to make and other actions the company may be taking (such as where the company itself is trading in its stock through a repurchase program or otherwise). Disclosure obligations also may arise from other sources, such as stock exchange rules or state law. Finally, we note that there are sometimes tactical reasons for a company to make disclosure even when it has no legal obligation to do so.

Contact:

Spencer D. Klein
(212) 468-8062
spencerklein@mofo.com

Michael G. O'Bryan
(415) 268-6352
mobryan@mofo.com

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