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# Deal Disclosures Trigger SEC Enforcement Attention

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The SEC recently announced two separate enforcement actions involving corporate disclosures made during unrelated battles for corporate control. This pair of actions serve as a reminder that the SEC continues to keep watch over M&A/share acquisition activities – in addition to the ever-present likelihood of private shareholder actions. (The SEC's cases are available here.)

**Disclosure of Fee Arrangement Challenged**

The SEC announced a settled administrative proceeding with an energy company. The company allegedly failed to adequately disclose material terms of its fee arrangements with investment banks that provided investment banking advice to the company in connection with a hostile tender offer by an activist shareholder.

The company's board opposed the activist's tender offer because it believed the price to be too low. And the company had enacted a poison pill provision, which necessitated the activist investor to negotiate with the company – as advised by the banks – even in the event of a successful tender offer. The activist investor's tender offer was successful, and the investor thereafter negotiated with the board. They agreed on a proposal that, according to the board, still undervalued the company by $12 per share. The shareholders nevertheless tendered their shares.

One of the banks' fees, a percentage of the aggregate consideration, allegedly was “payable in the event of a sales transaction,” regardless of the outcome. That is, the SEC alleged that the banks' fee was due even if the tender offer succeeded and/or the banks failed to produce any sort of value-enhancing outcome for the company. Neither the initial Schedule 14D-9, nor any of the following ten amendments, disclosed this fee. Instead, they disclosed only that the company had agreed “to pay customary compensation for such services.”

The company settled with the SEC on a neither-admit-nor deny basis. The SEC ordered the company to cease-and-desist from violating Exchange Act Section 14(d), and Rule 14d-9 thereunder. Yet the SEC did not impose a civil penalty because of the company's “remedial acts promptly undertaken” and its “extensive cooperation afforded the Commission staff.” The SEC announcement does not reveal what those remedial acts or extensive cooperation entailed.

**Disclosure of Ownership and Intent Information**

The SEC also announced a settled administrative proceeding with several

investor groups that allegedly failed to disclose ownership information during campaigns to influence or exert control over microcap companies.

Respondents in this action included two longtime friends and financial professionals who sometimes worked together on shareholder activism pursuits. Other respondents consisted of an investment vehicle, an investment adviser, and a hedge fund with various connections to and acted in concert with the two individuals.

The SEC alleges that some or all of the respondents worked together to acquire shares in five different companies. They intended to obtain board seats, influence corporate direction, and/or become controlling shareholders of each of the entities. Yet they allegedly failed to disclose their intent, or the accurate size of their collective holdings, in their Schedule 13D and 13G filings.

The respondents each settled with the SEC on a neither-admit-nor deny basis. In addition to a cease-and-desist order against all five respondents, the SEC ordered four of the respondents to pay civil penalties totaling $420,000.

**Conclusion**

These cases provide helpful reminders for companies and their counsel involved with corporate control transactions that accurate disclosures about the transaction are necessary. Not only are private litigants watching, but so too is the SEC.

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