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DOJ/FTC PROPOSE MASSIVE CHANGES TO HSR PREMERGER FILINGS: WHAT YOU NEED TO KNOW

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The Federal Trade Commission ("FTC") and U.S. Department of Justice Antitrust Division ("DOJ") have proposed to expand dramatically the scope and burden of preparing a merger filing in the United States. The proposed changes to the Hart-Scott-Rodino ("HSR") Act rules and filing form would: (i) introduce obligations to address substantive antitrust issues in the HSR Form; (ii) require submission of data that could expand the scope of HSR investigations; and (iii) add significant administrative burdens in the form of information requests related to corporate organization, deal structure, financial disclosures, and day-to-day business operations. The proposed new filing form includes information requests designed to help the DOJ and FTC identify and investigate issues consistent with their recently released draft merger guidelines.

These FAQs are offered as practical advice on the HSR filing developments.

What Have The U.S. Antitrust Enforcers Proposed?

The HSR Act[1] requires parties to certain mergers and acquisitions to make premerger notification filings with the DOJ and FTC, and to observe statutory waiting periods, prior to consummating their transaction. The usual HSR Act waiting period is 30 calendar days, unless the government issues a Request for Additional Information and Documentary Material ("Second Request"). The Second

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pared for challenges to spinco arrangements. Generally, in connection with the spin-off of a subsidiary, the parent can put into place at the spinco whatever arrangements it determines. *Columbia Pipeline* highlights that, to the extent that directors or officers of the parent become directors or officers of the spinco, there is the possibility of challenges to the arrangements as having been part of a "plan" that they engineered pre-spin—such as, in this case, a transfer of value from the triggering of change-in-control agreements (as the benefits would not have been triggered in a sale of the subsidiary by the parent but were triggered in the merger following the spinoff).

ESG AND FIDUCIARY DUTIES IN M&A

By Gordon Raman, Marie-Christine Valois and Paul Blyschak

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What role have environmental, social, and corporate governance ("ESG") considerations been playing in M&A negotiations and director decision-making? Recent years have seen much debate regarding the interaction of ESG and directors' fiduciary duties generally. Also well-explored are such ESG issues in M&A as ESG due diligence, ESG in target valuation, and post-closing ESG integration. Comparatively less analysis has occurred regarding the *more specific question* of the interaction of ESG considerations and directors' fiduciary duties in the M&A context.

This being the case, we revisited two large Canada/U.S. cross-border M&A deals from recent years. We also reviewed the publicly available acquisition agreements and related target information circulars from 73 Canadian public M&A deals valued at C$100 or more executed between May 2021 and May 2023.[1] We found that:

- ESG considerations have been making interesting inroads into North American M&A, including in key deal terms and in target information circulars.
- The rise to prominence of ESG flags a potentially complex issue for corporate fiduciaries going forward: whether, and to what extent, ESG issues should be taken into account in deciding what constitutes a "superior proposal" for the purpose of a target's "fiduciary out."
- The foregoing "fiduciary out" and "superior proposal" analysis might vary depending on the particular law governing the transaction (*i.e.*, Delaware or Canadian law).

ESG in M&A Deal Terms

The manifestation of ESG in M&A due diligence and a target's representations and warranties have become well known. One notable example is the so-called "Weinstein clause" whereby targets provide (negative) assurances regarding (and/or disclosure of) sexual misconduct allegations against management or executives. Other examples include representations and warranties or other contractual provisions addressing equity, diversity and inclusion practices, privacy and data security safeguards

and protocols, and anti-corruption policies and monitoring.

However, ESG-considerations are also capable of being more fundamental to an M&A transaction and its deal terms.

In July 2017, Hydro One, a utility operating primarily in Ontario, Canada, announced its agreement to acquire Avista, a Spokane, Washington-based utility, for US$5.3 billion. The deal included several bespoke and ESG-related undertakings by Hydro One, including commitments to maintain Avista's (1) headquarters and other office locations, (2) existing community involvement and support initiatives, (3) annual charitable donation budget, and (4) regional economic development strategies.[2]

More recently, in February 2022, Toronto Dominion ("TD"), one of Canada's largest banks, announced its agreement to acquire First Horizon, a bank based in Memphis, Tennessee, for US$13.4 billion. After the deal began encountering opposition from certain U.S. regulators and politicians, TD announced a five year "community benefits" plan. This included TD pledging to (1) open at least 25 new branches in low- to moderate-income ("LMI") or majority non-white markets, (2) increase residential mortgages loans by 65% for LMI and non-white borrowers, and (3) hire extra mortgage loan officers of diverse backgrounds.[3]

ESG in M&A Decision-Making

Similar manifestations of ESG are apparent in recent M&A boardroom decision-making. In particular, in reviewing the publicly available acquisition agreements and information circulars for 73 recent Canadian public M&A deals valued in excess of C$100 million, we identified ESG-issues being raised from multiple angles.

In a 2021 merger of mining companies, for example, the target's directors put indigenous relations at the forefront. In arguing for the deal, the target board first indicated that the combined company was "positioned to be a leader in ESG initiatives in British Columbia." The circular also described the offeror as "a respected partner of the First Nations" in B.C. and argued that "First Nations partners and community partners will be very well positioned to succeed and develop under [the offeror's] world-class stewardship." Similarly, the circular argued that the "concurrent operation" of the target's and offeror's nearby mines would "allow for aligned and optimal engagement with [local] First Nations and the broader community. . ."

In another 2021 transaction, an issue for the target board was whether a competing bid was *less attractive* from an ESG perspective. The large midstream energy company was faced with two concurrent offers, one from another midstream player and one from a private equity firm. Although the target would eventually accept a higher second offer from the private equity firm, in an earlier information circular issued in support of the other midstream company's bid, the target made several noteworthy ESG-related statements. First was a section highlighting the "sustainability and ESG initiatives" of the target. Second, in arguing *against* the private equity firm's initial, lower offer, the target underscored what it claimed to be the "limited transparency on ESG reporting" anticipated from the private equity firm. Finally, in arguing *for* the other midstream company's bid, the circular emphasized that the combined company would have

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"greater capacity and a broader portfolio of opportunities to pursue ESG-related investments, including those that. . . support the transition to a lower carbon economy."

Similarly, in a 2022 mining merger a question for the target board was whether a subsequent, competing offer was *more attractive* from an ESG perspective. The target was poised to be acquired by another mining company and among its reasons to recommend the combination the target's board highlighted the companies' shared commitment "to decarbonisation, environmental, safety and health, diversity and stakeholder value creation targets."

The deal was abandoned by the target's board in favor of a subsequent three-party merger that included a 15% premium as well as a significant cash component. However, the competing proposal also appeared to feature stronger ESG merits than the previous transaction. One was that the companies were committed to "responsible growth. . . underpinned by a strong focus on. . . upholding leading sustainability and ESG performance." Another was that the target's "leading [ESG] credentials and results" would "improve [the combined company's] ESG position among its peers. . ." A third was the target's "climate action strategy and its leading efforts in emissions reduction," which were "expected to support and advance the greenhouse gas emissions intensity performance in the combined company."

Issues Raised for Directors in M&A: ESG and "Fiduciary Outs"

The underlying question collectively raised by the foregoing examples is relatively straightforward: where an initial M&A transaction includes a not-insignificant ESG benefit or rationale, should this be taken into account in deciding whether a subsequent offer constitutes a "superior proposal"? The answer is less clear.

Market practice in both the U.S. and Canada is for a "superior proposal" in a merger agreement's "fiduciary out" clause to be defined as one that is more favorable to the target's shareholders from a financial point of view without reference to any other stakeholder interests. At first glance, this would not appear to leave much room for weighing the competing two bids' relative ESG merits. That said, this assumes that little or no value is attributed to ESG efforts, a point currently under fierce debate by pro-ESG advocates (who argue that ESG agendas lead to value creation) and anti-ESG advocates (who argue that ESG agendas distract from value creation).

Also, notwithstanding the market standard definition of "superior proposal" which refers only to shareholders' financial interests and not any other stakeholder interests, one can envision matters being complicated by external (*e.g.*, political) factors. Suppose, for example, a topping bid was made for Avista that, although superior from a financial point of view, did not duplicate Hydro One's commitments to local management, employees and community development? Similarly, suppose a higher bid was made for First Horizon that did not replicate TD's undertakings regarding increasing and improving services within low and moderate-income communities? Regardless of the technical legal analysis under the "fiduciary out" clause, one would expect such interloper insensitivity to ESG matters to give the target board cause for pause. Furthermore, the definition of "superior proposal" in the Avista deal *actually required* that Hydro One's assurances regard-

ing local management, employees and community development be weighed in considering a competing bid.

On the other hand, things may be simplified where the competing bid is more attractive from both a value perspective and an ESG perspective. The higher value would clear the "fiduciary out" clause's hurdle of being more favorable to shareholders from a financial perspective. The greater ESG benefits could then, presumably, only further enhance the bid's virtues. Regulatory considerations may also factor in. In addition to being more favorable to shareholders from a financial perspective, the market standard definition of "superior proposal" also requires the target board to weigh whether a competing bid is likely to be consummated on the same timeline taking into account all "legal" and "regulatory" considerations. Presumably, and once again using the Hydro One/Avista and TD Bank/First Horizon deals as examples, this test is more likely to be satisfied where even more (or at least the same) ESG undertakings are assumed by the competing bidder.

Another consideration is applicable governing law. A significant determinant, at least in the U.S. in the context of a sale transaction, would likely be whether the *Revlon* doctrine developed by the Delaware Supreme Court has been triggered as, where this occurs, the target board is obligated to be laser focused on maximizing the short-term equity value of the corporation. This returns us to the debate between pro-ESG advocates and anti-ESG advocates regarding whether and to what degree ESG agendas lead to value creation. The difference in the context of a *Revlon* analysis is that some pro-ESG advocates speak of ESG as creating value over the longer term rather than in the short term. To the extent this is the case the eligibility of ESG considerations under *Revlon* may be correspondingly narrowed.

By contrast, Canadian courts have declined to follow *Revlon*. Moreover, Canada's highest court has clarified that, while directors' fiduciary duties are owed to the corporation itself, when deciding what is in the best interest of the corporation directors may not only consider shareholder interests but also the interests of such other stakeholders as employees, consumers and the environment. Canada's highest court has also repeatedly underscored that directors are "required to act in the best interests of the corporation viewed as a *good corporate citizen*. . ." Altogether, these factors suggest the possibility that the outcome of an analysis into the relevance of ESG considerations in deciding the merits of a competing bid could be somewhat different in Canada than south of the border.

In total, there are as of yet no definitive answers (or even near to definitive answers) to the foregoing questions. Rather, we raise them because we foresee the general issue becoming increasingly relevant as the rise in prominence of ESG continues. We would not expect the market standard drafting of "fiduciary outs" or their subcomponent definition of "superior proposal" to change in light of ESG's incursion into boardroom decision-making. Indeed, recent studies have confirmed the consistency and resiliency of these clauses and definitions over time and notwithstanding fairly significant developments in the law of fiduciary duties, at least in Canada.[4] That said, we would not be surprised to see greater regularity in the need for directors and their counsel to consider the interplay between ESG-considerations and fiduciary duties in the M&A

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context, including in light of the particular deal terms at hand. So too can we foresee this analysis as sometimes proving complex, including for nuances of the applicable governing law and/or the particular political or regulatory context.

ENDNOTES:

[1]The authors give their thanks to Andrea Chabot and Simon Brissette for their excellent work compiling, organizing and reviewing our sample of 73 public M&A agreements and related target information circulars.

[2]The transaction did not close due to non-approval by Washington and Idaho utilities regulators who expressed "public interest" concerns arising from the acquirer being subject to Ontario's "political pressure, legislative power, and special governance agreements."

[3]Neither did this transaction close, the parties mutually agreeing to terminate due to "uncertainty as to when and if [. . .] regulatory approvals [could] be obtained. . ."

[4]*See* C. Hutchison, "To Whom Are Directors' Duties Owed? Evidence from Canadian M&A Transactions" (forthcoming in the *McGill Law Journal*).

DELAWARE COURT OF CHANCERY WILL REQUIRE SUPPLEMENTAL DISCLOSURES TO BE "PLAINLY MATERIAL" TO JUSTIFY MOOTNESS FEE AWARDS GOING FORWARD

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In *Anderson* v. *Magellan Health, Inc.*,[1] the Delaware Court of Chancery drastically reduced a plaintiff's mootness fee request and held, in an opinion by Chancellor McCormick, that, moving forward, plaintiffs can justify a mootness fee only if they obtain supplemental disclosures that are "plainly material." In so holding, the court split with prior Court of Chancery precedent requiring that such disclosures be merely "helpful" to support a mootness fee. The result is that the standard required for supplemental disclosures in the context of a mootness fee award is now higher and in line with the "plainly material" standard established for disclosure-only settlements in *In re Trulia, Inc. Stockholders Litigation*.[2] *Magellan* also provides helpful guidance around the dollar value of mootness fee awards based on supplemental disclosures, as well as the standards required for a mootness fee award based on the loosening of deal protections, including the waiver of "don't-ask-don't-waive" standstill provisions.

Background

In January 2021, Magellan entered into a merger agreement with Centene Corporation. At that time, five standstill agreements containing "don't-ask-don't-waive" provisions remained in effect with prospective bidders from an earlier 2019 sale process. Customary standstill provisions for a sale process prohibit the bidder from