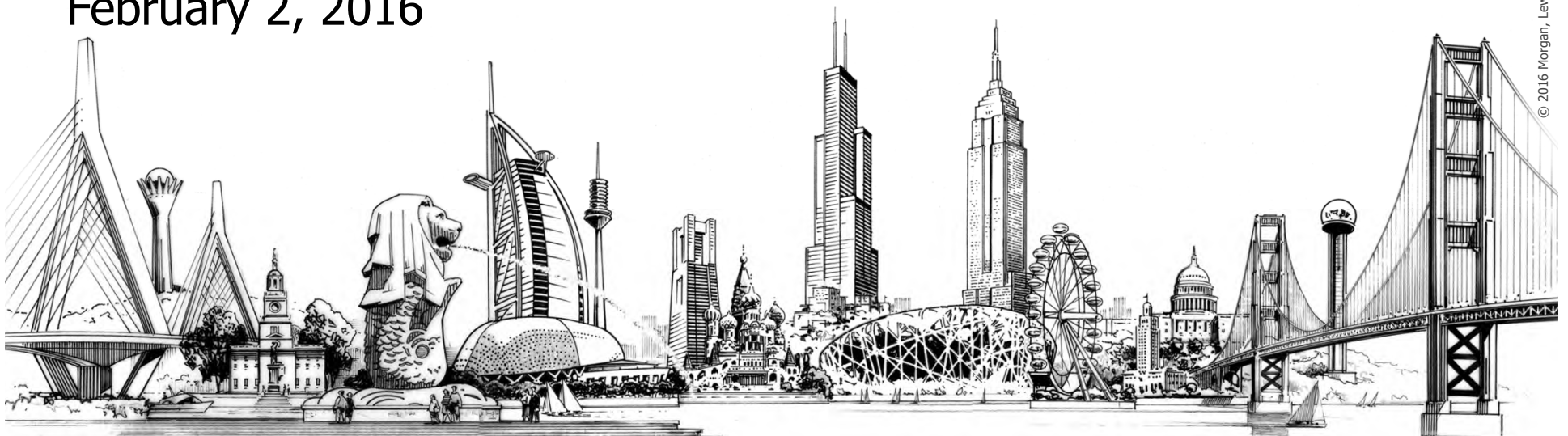


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USING STOCK AS ACQUISITION CONSIDERATION

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Topics to Be Covered Today

- Market data
- Deal considerations
- '33 Act considerations
- Other considerations

MARKET DATA

Market Data

Mergers in 2015 vs. 2012 (according to Mergermarket based on publicly announced deals)

Deals below \$500 million	2015	2015	2012	2012
Total Number of Deals	147		154	
All Stock	26	18%	22	14%
Combo Stock/Cash	19	13%	12	8%
Stock/Cash Election	28	19%	14	9%
All Cash	74	50%	106	69%
Other	0	0%	1	1%

Market Data (cont.)

Mergers in 2015 vs. 2012 (according to Mergermarket based on publicly announced deals)

Deals above \$500 million	2015	2015	2012	2012
Total Number of Deals	125		78	
All Stock	16	13%	5	6%
Combo Stock/Cash	31	25%	10	13%
Stock/Cash Election	11	9%	6	8%
All Cash	66	53%	56	72%
Other	1	1%	1	1%

DEAL CONSIDERATIONS

Deal Considerations

- Effect of all-stock consideration on *Revlon* duties:
 - “Sale of control” theory where the buyer is not controlled by a single shareholder
 - Limitations on this theory:
 - “Merger of equals” vs. “minnow and whale”
 - Impact of mixed consideration
- The board as stock picker for its shareholders:
 - Difference between marketable and nonmarketable consideration
 - Value of the fairness opinion

Deal Considerations (cont.)

- Changes in value after signing:
 - Fixed Value vs. Fixed Exchange Ratio
 - Target board orientation toward value
 - Buyer orientation toward earnings per share and dilution
 - In mixed-cash-and-stock deals, the drop in share price can push “boot” over the tax-free reorganization limit
- Collars as potential compromise

Collars

- Fixed exchange ratio or fixed value
 - Fixed exchange ratio = floating value (in a mixed consideration deal, value of forms of consideration diverges within the collar)
 - Fixed value = floating shares (in a mixed consideration deal, forms of consideration are constant within the collar)
- Collars coupled with a termination right
- Other considerations when drafting collars

Relationship Between Collars and Other Deal Elements

- Termination Rights for buyer MAC:
In a fixed-ratio deal, a collar-based walkaway can be a rough measure of a buyer MAC
- Fiduciary out:
Most fiduciary outs don't allow the target board to terminate prior to shareholder meeting absent an unsolicited overbid, and penalize a board's change to a "just say no" recommendation; a collar-based walkaway is usually a cleanout

Relationship Between Collars and Other Deal Elements (cont.)

- Protecting target board's original decision; bringdown of fairness opinion as a closing condition:

Bringdown conditions protect the target board, but make the deal dependent on a judgmental third-party determination; a collar-based walkaway gives objective protection for one of the important issues (buyer stock drop) that would be covered by a bringdown of the fairness opinion

- Purchaser fairness opinion
- Merger vs. exchange offer
- Stockholder approval

'33 ACT CONSIDERATIONS

'33 Act Basic Considerations

- Significance of '33 Act Applicability
- Deal Communications
- S-4 Registration
- Exchange Offer
- Private Placement
- Section 3(a)(10) Fairness Hearing
- Buyer Shareholder Vote

Significance of '33 Act Applicability

Using stock as acquisition consideration constitutes a securities transaction involving an offer and sale of securities subject to the '33 Act

Registration required unless an exemption is available

Deal Communications

- Market desire for information and public company reporting requirements
 - 8-K filing requirements
 - Market expectations
 - Exchange requirements
 - Employee concerns, selective disclosure and insider information
- But must comply with limitations on communications under Securities Act (offering) and proxy rules (solicitation of stockholder votes)

Deal Communications (cont.)

- Rule 425 communications (legend and filing requirements)
- Rule 14a-12 for solicitation before filing proxy statement (satisfied by filing under Rule 425)
- Rule 14a-6 after filing preliminary or definitive proxy statement
- Regulation M-A and interpretations of what constitutes an offer or solicitation
 - Target audience
 - Written vs. oral communications
 - “Reprints”
- Public acquirer can use Form 8-K where appropriate
 - Furnished vs. filed
 - Can satisfy Rules 425 and 14a-12 if the boxes on the cover page are checked (and gain benefit of incorporation by reference into S-4)

S-4 Registration with Shareholder Vote

- Delay
 - Signing to filing typically 3-4 weeks
 - Filing to mailing typically 7-9 weeks due to SEC review and response to comments
 - Mailing to shareholder meeting typically 3-4 weeks (private targets may be able to accelerate by using consents)
 - Effect on feasibility of a third-party overbid, activist objection campaign
 - Financial statement requirements
 - Historical
 - Pro forma

Lockups as Removing Shares from S-4

- Issue: Lockups represent an investment decision solicited by the buyer and made prior to circulation of disclosure document
- Could render shares as not registered
- Historically, the SEC staff didn't object if major shareholders and insiders signed lockups, but its practice varied

Lockups as Removing Shares from S-4 (cont.)

- CDI question 239.13 (Nov. 26, 2008) codified evolved staff practice
- It provides that:
 - Lockups can be signed by executive officers, directors, affiliates, founders, and their family members and 5%-or-greater holders; locked-up shares must be less than 100%; and the nonsigning shareholders must not be eligible for private placement exemption
 - Actual upfront consents (a potential answer to *Omnicare* problems) make the entire deal unregistrable

Lockups as Removing Shares from S-4 (cont.)

- Note: Lockup may disqualify the signing target shareholder from making Section 11 claims under the registration statement (*APA Excelsior III, LP v. Premiere Technologies, Inc.*, 476 F.3d 1261 (11th Cir. 2007))

Other Issues in Registered Acquisitions

- Registration of target stock-based compensation
- Registration of target warrants:
 - Warrant shares eligible for inclusion in S-4
 - Resale of warrant shares as requiring a separate reoffer registration
 - Private placements and “no sale” alternatives

Other Issues in Registered Acquisitions (cont.)

- Titan: “clean” representations in the filed acquisition agreement
 - Separation of disclosure appendix into free-standing document
 - Common use of disclaimer boilerplate

Exchange Offers

- Reg M-A allows exchange offers to commence and close like tender offers (20 business days) without previous S-4-type review and comment
 - “File and go” to commence, but acceleration order needed to close; status of buyer’s ‘34 Act documents
- Slow antitrust review schedules outside the United States may moot the speed advantage of an exchange offer

Exchange Offers (cont.)

- The all-holders best-price rule (Rule 14d-10), as amended in 2006, provides a safe harbor for officer/employee deals approved by fully independent compensation committee
 - Several circuits had viewed typical officer/employee features of an acquisition (acceleration of options, severance provisions, noncompetition payments) as contrary to preamendment Rule 14d-10
 - Amended Rule 14d-10 narrowed the earlier broad language as well as provided the safe harbor

Section 3(a)(10) Fairness Hearing

- Requires a deal connection with California, North Carolina, Oregon, or Utah – or a British Commonwealth country (“schemes of arrangement”)
- Process in California can save 4-8 weeks (and lots of lawyer dollars) vs. an S-4
- Not appropriate (at least in California) if there is possible dissension among target shareholders or optionholders

Section 3(a)(10) Fairness Hearing (cont.)

- '33 Act transferability of shares is the same as in a registered transaction
 - Transaction need not be a public offering – it can be used as an alternative to an S-4 even if the target has only 1 shareholder
- No NSMIA preemption so state securities law must be considered

Private Placements

- Rule 144 provides reasonable liquidity for target shareholders without registration
 - Public Issuers: Unlimited resales after 6 months; issuers must remain current on '34 Act reports, but this requirement drops away after month 12
 - Private Issuers: Unlimited resales after 12 months
 - No volume limitations, brokers' transactions limitation, Form 144 for nonaffiliates of buyer

Private Placements (cont.)

- Private placements with postclosing registration:
 - Demand registrations covenant usually has conditions and issuer deferral rights
 - Coordination among selling shareholders required unless buyer is willing to put up a long-lived shelf
 - Selling shareholders have '33 Act liability under registration statement
 - Short Rule 144 holding period, elimination of pre-2008 presumptive underwriter in Rule 145 weaken the argument for postclosing registration
 - Consider an “immediate” resale S-3 filing, but don't file it before closing

A Reminder About Regulation M

Market manipulation issues arise when the buyer is issuing shares in an acquisition (i.e., “engaged in a distribution”) while at the same time making purchases of its own stock

Buyer Shareholder Vote

- NYSE and Nasdaq rules require a buyer shareholder vote if the deal will result in:
 - The issuance (actual or potential) of shares constituting 20% or more of the predeal outstanding shares or voting power (i.e., target shareholders end up with more than 16-2/3% of the resulting company)
 - A change of control – Apparently, an NYSE/Nasdaq “change of control” can be triggered by the creation of a block smaller than 16-2/3% (post-deal)
- California’s unusual voting requirements (and dissenters’ rights) in triangular mergers, exchange offers, and asset acquisitions can apply to California-centric companies incorporated elsewhere

OTHER CONSIDERATIONS

Blue Sky Laws

- Federal Registration and:
 - NSMIA preemption
 - Notice requirements and fees
 - State qualifications/permits (3(a)(10) alternative)
 - Limited offering exemptions

Targets with Complex Capital Structures

- Large target shareholder as a new shareholder of buyer
- Targets with preferred stock or other convertible securities

Stock Used in Postclosing Escrow

- For claim settlement purposes, is stock held in escrow valued as of closing or as of the claim payment date?
 - Investment aspect (buyer optimism, target skepticism)
 - Income tax aspect:
 - Fixing value at closing makes the escrowed stock look like deferred consideration, with unstated interest for target shareholders
 - Fixing value at claims payment date makes the escrowed stock look like it has been owned by target shareholders from closing date forward (no deferred consideration)

Biography



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Sheryl L. Orr is a partner in the Commercial Business Transactions Practice. Sheryl represents clients in the structuring and negotiation of US and cross-border mergers, acquisitions, dispositions, carve-out transactions, joint ventures, and other strategic business transactions. Sheryl has significant experience representing both strategic and financial acquirers in the financial services, life sciences, media, and maritime industries. Her clients range from Fortune 500 companies to investment banks to emerging market companies.

Biography



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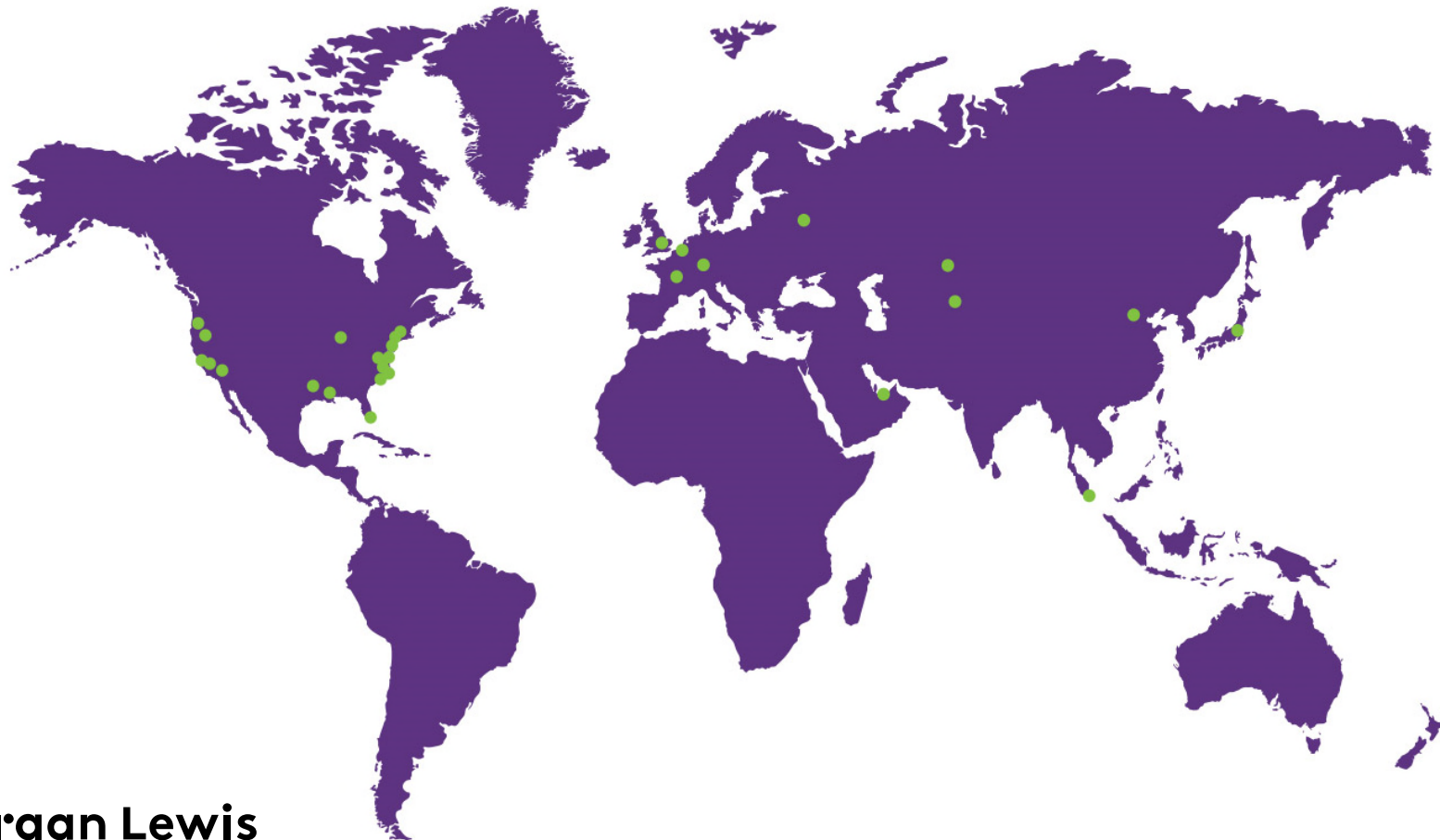
Jeffrey A. Letalien represents domestic and foreign issuers, underwriters, and investors in diverse transactions. These transactions include public and private offerings and business combinations, as well as with respect to corporate governance, reporting and disclosure obligations, and other matters relating to securities regulation. Jeff regularly counsels public companies on compliance with periodic reporting requirements, complex indenture covenant requirements, and the corporate governance requirements of various stock exchanges.

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