Practical Tips for Preparing the Background of the Merger Section

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The "Background of the Merger" section is one of the most intensely scrutinized portions of a merger proxy statement. Serving as the primary narrative of the transaction process, the section provides stockholders with the context necessary to understand the board's decision-making process, the negotiations between the parties, and the alternatives considered before approval of the transaction. As a result, the section is frequently reviewed by the SEC Staff, Delaware courts, investors, and plaintiffs' counsel to assess whether stockholders have been provided with a materially complete account of the events leading to the transaction.

Preparing the Background section can present practical challenges. Careful planning, contemporaneous documentation, and a disciplined drafting process can reduce SEC comments, minimize litigation risk, avoid unnecessary media coverage, and streamline preparation of the proxy statement.

LEGAL FRAMEWORK

Item 14 of Schedule 14A, which incorporates Items 1005(b) and 1011(a)(1) of Regulation M-A, requires disclosure of material negotiations, transactions, and contacts between the parties and their representatives during the two years preceding the transaction, including discussions with other potential acquirors. The disclosure should identify who initiated material contacts and provide sufficient context for stockholders to understand the transaction process. [1]

In addition to these specific disclosure requirements, Rule 14a-9 under the Securities Exchange Act of 1934 prohibits proxy statements from containing any material misstatement or omitting material information necessary to make the statements made not misleading. As a practical matter, companies should not view the Background

[1] For ease of reference, this article refers to the "Background of the Merger" section of a merger proxy statement. Similar disclosure requirements apply in other business combination disclosure documents, including Schedule TO and Schedule 14D-9 in tender offers, Schedule 13E-3 in going-private transactions, and registration statements on Form S-4 and Form F-4 in transactions involving the issuance of securities.

section as a mechanical chronology designed solely to satisfy Regulation M-A. Rather, the Background section should present a coherent narrative of the transaction, providing stockholders with an account of the material events leading to the transaction and sufficient context to permit an informed evaluation of the board's decision-making process.

State corporate laws also impose fiduciary disclosure obligations on directors in connection with a stockholder vote. Although the precise contours of those duties vary by jurisdiction, directors are generally required to provide stockholders with the material information necessary to make an informed voting decision.

For example, Delaware courts have explained that, while a proxy statement need not provide a play-by-play account of every negotiation, "*when fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with an accurate, full, and fair characterization of those historic events*."[2] Complete disclosure may also be important in preserving the availability of the business judgment standard of review. The Delaware Supreme Court has held that business judgment review under *Corwin* will not apply to stockholder approved transactions where "*partial and elliptical disclosures*" leave stockholders less than fully informed.[3]

PRACTICAL TIPS FOR DRAFTING

- **Begin documenting the process early.** Parties should consider the Background section from the beginning of a strategic review process or the initial contacts between parties. Companies should designate an individual to maintain a deal log recording key dates, participants, who initiated material contacts, the principal topics discussed, and significant developments in the negotiations.

- **Document strategic alternatives and bidder outreach.** The deal log should track strategic alternatives considered, outreach to potential bidders, and the rationale for decisions not to pursue particular opportunities. It should also document material confidentiality agreements, including the execution of NDAs, the existence of standstill provisions (particularly any "don't ask, don't waive" provisions), any subsequent waivers or modifications, and the extent to which those provisions affected the sale process.

  Delaware courts have held that standstill provisions may be material where they could affect a bidder's ability to submit or improve an offer, and the SEC Staff has

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[2] See *In re Mindbody, Inc., S'holder Litig.*, 2023 WL 2518149, at *3, *47 (Del. Ch. Mar. 15, 2023).

[3] See *Morrison v Berry*, 180 A.3d 1055 (Del. 2018).

requested additional disclosure where proxy statements reference standstill provisions without adequately explaining their operation or significance. Plaintiffs' counsel will frequently demand disclosure of such provisions in the demand letters sent to companies following announcement of a transaction. Companies should therefore maintain records identifying which bidders executed NDAs, the material restrictions they contained, when those restrictions were modified or waived, and whether they affected the bidding process or the reasons particular bidders did not continue to participate.

- **Educate transaction participants.** Ensure that all participants in the transaction, including senior management, directors, and advisors, understand that meetings, calls, informal discussions, emails, and text messages may later need to be described publicly in the Background section.

  Participants should assume that emails and text messages regarding the process—including those sent on personal devices—may be subject to discovery to plaintiffs' counsel even if not initially included in the Background section. Recent post-trial decisions have reconstructed the negotiation history largely from such communications and evaluated the proxy statement's narrative against them.

- **Consider whether disclosure is "complete".** Recent SEC Staff comment letters underscore that the Staff continues to review the Background section closely for completeness and context. Staff comments frequently request issuers to expand their disclosure to explain how negotiations evolved, why material terms changed, and the rationale for key decisions made by the parties and the board. For example, the Staff has asked companies to disclose changes between successive financial projections, explain negotiations over merger consideration and transaction structure, describe discussions regarding governance provisions and other material deal terms, identify the reasons certain alternatives or procedural safeguards were accepted or rejected, and provide additional detail regarding interactions with potential bidders, financial advisors, and management. The SEC Staff also frequently compares the Background section to Section 13 filings by transaction participants, to police compliance with timely filing requirements.

  Plaintiffs' counsel likewise scrutinize the Background section for potential or perceived omissions or incomplete descriptions that may obscure the significance of negotiations, changes in transaction terms, or the board's decision-making process.

- **Maintain accurate minutes.** Board and committee minutes should accurately reflect strategic alternatives considered, advice received, and material decisions made.

- **Cross-check the record.** Compare the Background section against board minutes, financial advisor presentations, management projections, merger agreement drafts, and other sections of the proxy statement for consistency. This exercise is important, as plaintiffs routinely use Section 220 books and records demands to obtain board materials before filing fiduciary duty claims. Once those materials are produced, plaintiffs frequently compare them line by line against the proxy statement in search of omissions, inconsistencies, or descriptions of the negotiation process that do not align with the underlying record.

- **Coordinate with transaction participants and build in sufficient review time.** A coordinated review by the principal participants in the transaction can help identify factual inaccuracies, resolve inconsistencies, and ensure that the final disclosure fairly reflects the contemporaneous record. This review should include close coordination with financial advisors and their counsel to ensure that the Background section, the summary of the financial advisor's fairness opinion, and related disclosure elsewhere in the proxy statement consistently describe the transaction process, financial projections, negotiations, and the analyses considered by the board. It should also confirm that the proxy statement accurately describes each financial advisor's material relationships with the counterparty and its affiliates, as well as the advisor's compensation arrangements—generic references to "customary compensation" and undisclosed concurrent engagements for a buyer or its consortium members can render stockholder approval uninformed.

  The Background section should also be reviewed by the directors of the company. Directors should carefully review the Background section to confirm that it fairly and accurately reflects the board's deliberations and the transaction process as a key element of their review of the proxy statement as a whole.

  Acquirors and their counsel should likewise carefully review those portions of the Background section describing their interactions with the target, as disclosure claims can create litigation risk for the buyer, either directly through aiding-and-abetting claims or indirectly through the costs, delays and potential liability associated with transaction litigation.[4]

FINAL THOUGHTS

Preparing the Background section requires careful coordination among management, directors, financial advisors, and counsel throughout the transaction process. We would

[4] See *In re Columbia Pipeline Grp., Inc. Merger Litig.*, No. 281, 2024 (Del. June 17, 2025).

be pleased to discuss these issues or other practical considerations relating to merger proxy disclosure and transaction planning.

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