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DOJ AND FTC RELEASE FINAL RULE EXPANDING HSR PREMERGER FILING REQUIREMENTS

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The Federal Trade Commission ("FTC") unanimously issued a final rule expanding the requirements of premerger filings under the Hart-Scott-Rodino Antitrust Improvements ("HSR") Act of 1976. The HSR Act requires parties to certain mergers and acquisitions to make premerger notification filings with the U.S. Department of Justice ("DOJ") and FTC, and to observe statutory waiting periods, prior to consummating their transaction. The final rule is a compromise that pares back many administrative burdens in the FTC's June 2023 draft rule.[1]

Although the final rule scaled back several of the initial proposed requirements, it still: (i) introduces novel obligations to address substantive antitrust issues in HSR filings; and (ii) requires submission of additional data and documents compared to the current HSR form. The final rule takes effect on February 10, 2025 (90 days after it was published in the Federal Register). Therefore, parties expecting to file on or after February 10, 2025, will need to file under the new rules.

Most HSR filings will take more time to prepare, which dealmakers should reflect in transaction covenants. Dealmakers also need to consider the effect of substantive disclosure obligations on risk of a DOJ or FTC investigation. It is not all bad news, however: The Commission also announced it would lift its February 2021 suspension of HSR waiting period "early terminations" for deals without antitrust concerns.

Substantive Antitrust Issues

The most significant change is the obligation to identify certain substantive antitrust issues in the HSR filing, including a "brief" description of horizontal overlaps and vertical supply relationships. Certain acquisitions unlikely to involve overlaps and deals involving products or services generating less than $10 million in revenue are excepted from this obligation.

Product Descriptions and Horizontal Overlaps. The final rule requires merging par-

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game and to stand behind their representations and warranties. In the end, it's always about the leverage of the parties in a particular transaction and the specific facts and circumstances applicable to the subject transaction. If the seller has an A class asset with great appeal to drive competition among multiple buyers, the leverage will lean toward the seller and you will be more likely to see a no-survival deal. On the other hand, when the buyer has more leverage, it is more likely that a no-survival deal format will not be used."

Other Survey findings included:

- Of the middle-market deals surveyed in 2023/2024, approximately 15% included earnouts, as compared to 17% in 2022/2023. And of the deals surveyed in 2023/2024 with earnouts, approximately 50% provided for earnout amounts in excess of 30% of the purchase price while roughly 30% of such deals provided for earnout amounts less than 5% of the purchase price.

- Of the middle-market deals surveyed in 2023/2024, about 76% used a "Material Adverse Effect" ("MAE") qualifier for the representations and warranties bring-down closing condition, compared to about 81% in 2022/2023. Approximately 17% used an "in all material respects" qualifier for the representations and warranties bring-down closing condition, compared to roughly 13% in 2022/2023. The high percentage of deals using the MAE qualifier for the representations and warranties bring-down closing condition is a seller-friendly term that increases certainty of closing for sellers, Seyfarth Shaw said.

ENDNOTES:

[1]For articles on previous editions of this survey, *see The M&A Lawyer*, October 2023, Vol. 27, Issue 9; *The M&A Lawyer*, April 2022, Vol. 26, Issue 4; *The M&A Lawyer*, May 2020, Vol. 24, Issue 5; *The M&A Lawyer*, May 2019, Vol. 23, Issue 5,

[2]*See* https://www.seyfarth.com/dir_docs/documents/flipbooks/2024_MA_SurveyBook.pdf.

NOMINEE DIRECTORS AND CONFIDENTIAL INFORMATION UP NORTH: WHAT U.S. PRIVATE EQUITY AND VENTURE CAPITAL SHOULD KNOW

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Nominee directors are central to private equity and venture capital investment strategies. Significant investors expect to gain meaningful visibility and strategic input into the investee company, and thus routinely negotiate for the right to appoint one or more nominee directors. But what should take precedence: the confidentiality of board deliberations or the investors' expectation of information?

Earlier this year in *Illumina*,[1] the Delaware Court of Chancery (the "Court") confirmed when company confidential information can be shared by a nominee director with the nominating shareholder under Delaware law. As Canada is regularly among the top five destinations for outbound U.S. transactions by both deal value and volume, U.S. cross-border lawyers will be interested to know that Canadian corporate law differs somewhat from Delaware on this important issue.

We highlight what U.S. investors in the Canadian market, and their nominee directors, need to know about the sharing of confidential company information in Canada. We then provide key practice points to consider when selecting nominee directors as part of Canadian investment transactions.

Delaware: Nominee Directors, Dual Fiduciaries and Designation Rights

At issue in *Illumina* was whether a company director who was employed by an activist shareholder could share confidential board communications with the activist shareholder.

The Court confirmed that Delaware has a "long line of caselaw dating back to 1992" that only permits a nominee director to share confidential company information with the nominating shareholder in "certain limited circumstances."[2] These are:

- When the director "serves as a controller or fiduciary of the stockholder,"[3] because of the impossibility of compartmentalizing information obtained through the board position from the director's responsibilities in their other fiduciary role. OR
- When the "stockholder has the right to designate [the] director, either by contract or through its voting power."[4] Here there is a presumption that, by virtue of a stockholder or shareholder agreement with nominating rights, the nominee will share information with the nominating entity, and thus the company should not expect confidentiality from such nominee.

In *Illumina*, the Court ruled that neither of these tests were satisfied in the circumstances. The director was not a controller or fiduciary of the activist shareholder, only a mere employee. The director had not been appointed as the result of any designation right in favour of the activist shareholder, but by the ordinary vote of shareholders. Nor did the activist shareholder have the right to appoint the director via its voting power, holding only a 2% interest in the company.

Canada: Nominee Directors and the Primacy of the Company's Interests

How do things stand north of the border? An immediate caveat is that Canadian corporate law does not benefit from nearly the same depth of judicial consideration of confidentiality issues that Delaware does. Simply put, no Canadian court has definitively ruled on whether, or to what extent, a nominee director can share company confidential information with the nominating shareholder.

Nonetheless, it remains useful to compare and contrast relevant Canadian corporate law and the clear test set forth in *Illumina*.

One point relates to the notion of a "dual-fiduciary" as recognized in Delaware. This underlies the first test under *Illumina*, whereby a nominee director can share confidential information with a nominating shareholder where the director is also a fiduciary of the nominating shareholder. The rationale is that, because a director only has "one brain," it is "simply not realistic or practical to believe that any information to which [the director] may become privy as a result of [her director status] could be segregated from her thought process in her other capacity."[5]

Canadian courts have not yet had occasion to directly consider this issue. When addressing the duty of loyalty provided for in corporate statutes and the Civil Code of Québec, Canadian courts often emphasize that the duty is owed only to the company, and not to any particular stakeholder (including nominating shareholders).[6] They also indicate that a director must avoid conflicts of interest with the company, avoid abusing their position to gain personal benefit and maintain the confidentiality of information they acquire by virtue of their position.[7] Accordingly, should the interests of the company and any stakeholder conflict, the interests of the company must prevail.[8] This should give nominee directors and their nominating shareholders pause before relying on "dual fiduciary" arguments in Canada.

A second noteworthy comparison between Delaware and Canada relates to the exception arising from a shareholder's right to nominate the director either by contract or through its voting power. While Canadian corporate law does not address the specific circumstance of a shareholder having sufficient voting power to elect a nominee director, it is generally uncontroversial that the company and the nominating shareholder can contract

for the sharing of confidential company information (*e.g.*, in a shareholder agreement).[9]

That said, unlike in Delaware, in Canada the mere right of the nominating shareholder to appoint a nominee director may not be enough to trump the director's duty of confidentiality. In Delaware this logic is multifaceted. One justification is that the right to appoint a director results in a presumption that information will be shared by the director with the shareholder such that the company has no expectation of confidentiality.[10] Another justification is that the right to appoint a director effectively makes the director a representative of the shareholder, entitling the shareholder to the same information as the director.[11] Writing in *The Business Lawyer*, Vice Chancellor Laster has also advocated for this approach based on the "practical realities" of fund investment structures and investment management.[12]

As Canadian courts often consider Delaware rulings related to M&A and corporate governance, it is not impossible that a Canadian court may give weight to this reasoning in finding a similar implied right to confidential company information arising from a board nomination right. However, this would conflict with principles repeatedly affirmed by caselaw,[13] including decisions of the Supreme Court of Canada.

The third noteworthy comparison between Delaware and Canada is that a Canadian appellate court (in *PWA Corp. v. Gemini Group*) has ruled that, in exceptional circumstances, a nominee director may be obligated to share information *concerning the nominating shareholder* with the company on whose board the director sits.[14] Specifically, the court held that this duty may arise where the nominee director learns of information regarding the nominating shareholder that threatens a "serious loss" to a "vital aspect" of the company to whom the director owes fiduciary duties.

We are not aware of a similar result in the 30 years since the decision, and two aspects of the case may limit the likelihood of this occurring.[15] First, the nominee directors were part of the nominating shareholder's negotiating team pursuing the transaction that would be damaging to the company. Second, the nominee directors actively concealed from the company the fact that the nominating shareholder was pursuing the transaction. This included signing non-disclosure agreements prohibiting them from disclosing the existence of the negotiations, a circumstance that, according to the court, placed the directors in an "untenable position of conflict of interest" they could only resolve by resigning.[16] Although the court underscored the unique facts of the case, prudence warrants that the risk posed by *PWA Corp. v. Gemini Group*., even if arguably remote, is considered when appointing a director to the board of a portfolio company.

Key Practice Points Regarding Nominee Directors and Confidentiality in Canada

The foregoing variations between Canadian and Delaware corporate law highlight the need to approach nominee directors in Canada in a thoughtful and deliberate manner, including taking reasonably available precautions given the different issues presented. Key practice points to consider both when choosing who will serve as a nominee director and the terms of the nominating shareholder's right to appoint the director include:

- Best practice is to expressly address the sharing of confidential company information by the nominee director with the nominating shareholder in a written agreement between the company and the nominating shareholder (*e.g.*, a shareholders agreement). It is possible that company consent to the sharing of confidential information can be implied, but this will depend on the specific circumstances, and no Canadian court has yet done so. A clear written framework is thus preferable.

- Among other things, the agreement should (i) specify the nominating shareholder will maintain the confidentiality of any information received by its nominee, (ii) identify which of the nominating shareholder's personnel can have access to the information, and (iii) require the nominating shareholder to maintain protocols that will prevent the sharing of the information beyond permitted personnel. For example, care should be taken that

the information is not shared with any of the nominating shareholder's personnel who sit on the board of a competitor of the company.

- If the company is a reporting issuer, it may be prudent to establish an internal wall between the nominee director and personnel responsible for trading shares of the company owned by the nominating shareholder. That said, it is important to note that Canadian insider trading rules apply to both public and private companies and cannot be waived by written agreement or otherwise.[17]

- Consider including an express acknowledgment in a written agreement providing that the nominee director is under no obligation to share any confidential information of the nominating shareholder with the company. While this may not provide a complete defence to the risk raised by *PWA Corp. v. Gemini Group*, it may militate against a claim by the company that it had a reasonable expectation to such information.

- The risk raised by *PWA Corp. v. Gemini Group* will be amplified where there is tension between the interests of the nominating shareholder and those of the investee company. In case of a material conflict of interest, nominee directors should weigh all options, including potentially resigning from their board position.

- Bear in mind that, notwithstanding the sharing of company information, the duties of confidentiality and loyalty will endure and continue to prevent the nominee director and/or nominating shareholder from using company confidential information for any improper purpose. Nor will the nominee director's duty of confidentiality regarding company confidential information received during the director's tenure expire when the director ceases to serve on the company board.[18]

- Alberta is the only jurisdiction in Canada that allows for corporate opportunity waivers of the kind afforded under Delaware General Corporation Law s.122(17).[19] As such, except where the investee company is incorporated in Alberta and has adopted a corporate opportunity waiver, a nominee director and/or the nominating shareholder may be liable to the investee company for exploiting a business opportunity that should have first been offered to the company.

Concluding Comments: Mind the Different Fiduciary Landscape Up North

While nominee directors play a pivotal role in the relationship between significant investors and investee companies, the guardrails around company confidential information require careful navigation. The Court of Chancery's decision in *Illumina* provides valuable guidance regarding Delaware law on this point, but U.S. investors must appreciate the different legal landscape at play in Canada to ensure the adoption of appropriate risk mitigation procedures by both nominee directors and nominating shareholders.

ENDNOTES:

[1]*Icahn Partners LP et al v. Francis deSouza et al and Illumina Inc.*, C.A. No. 2023-1045-PAF (Del. Ch. Jan. 16, 2024) ["*Illumina*"].

[2]*Illumina* at p. 12.

[3]*Illumina* at p. 13.

[4]*Illumina* at pp. 12-13.

[5]*Illumina* at pp. 20-21, quoting *Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC*, 292 A.3d 178 (Del. Ch. 2023) and *In re CBS Corporation Litigation*, 2018 WL 3414163 (Del. Ch. 2018).

[6]*See* Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 204; Carol Hansell, *Directors and Officers in Canada: Law and Practice* (Toronto: Thomson Reuters, 2024); *Hawkes v. Cuddy*, [2009] EWCA Civ 291 at paras. 32-33 (Ch).

[7]*Peoples Department Stores Inc. (Trustee of) v. Wise*, para. 35.

[8]*See, e.g., Brockman v Valmont Industries Holland B.V.*, 2021 BCSC 500 (CanLII) at para. 115: "Shareholders have a reasonable expectation that the directors of a company will act in the best interests of the company. . . [T]hat principle would be fundamentally undermined if a majority shareholder's nominees to the board of direc-

tors were to prefer the interests of that majority shareholder to the interests of the Company as a whole."

[9]*See* B. Reiter et al, *Directors' Duties in Canada* (Seventh Edition) (LexisNexis Canada, 2021) at 4.13-4.14.

[10]*Illumina* at pp. 14-15, citing *Moore Business* Forms.

[11]*Illumina* at pp. 16-17, citing *Kalisman v. Friedman*, 2013 WL 1668205 (Del. Ch. 2013).

[12]See J. Travis Laster & John Mark Zeberkiewicz, "The Rights and Duties of Blockholder Directors" 70 *The Business Lawyer* 33 (2015).

[13]*See*, for example, *PWA Corp. v. Gemini Group Antomated Distribution Systems Inc*., 1993 CanLII 9401 (ON SC): "A director nominated by a particular shareholder of the corporation is not in any sense relieved of his or her fiduciary duties to the corporation. A nominee director is not accorded an attenuated standard of loyalty to the corporation. The director must exercise his or her judgment in the interests of the corporation and comply with his duties of disclosure, and must not subordinate the interests of the corporation to those of the director's patron."

[14]*See PWA Corp. v. Gemini Group Automated Distribution Systems Inc*., 1993 CanLII 8475 (ON CA).

[15]Note also that the court split on this point with the dissenting justice finding no breach of fiduciary duty by the nominee directors for failing to disclose the shareholder information to the investee company.

[16]*PWA Corp. v. Gemini Group Automated Distribution Systems Inc*., 1993 CanLII 9401 (ON SC) at 177.

[17]*See*, for example, *Canada Business Corporations Act*, RSC 1985, c C-44 at s. 131(4).

[18]*See Bulk Steel & Salvage Ltd. v. Love*, [1984] O.J. No. 329 (H. Ct. J.).

[19]For further discussion, *see* S. Gingrich, B. Schneider, G. McGlaughlin, C. Rose and P. Blyschak, "Delaware's Corporate Opportunity Waiver Comes to Canada," *The M&A Lawyer*, Vol. 27, Issue 9, October 2023.