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Allergan Settlement Has SEC Message About M&A Disclosure

By Michael Greene

(BNA) -- Companies entering into merger negotiations after fending off hostile takeovers should heed Allergan Inc.'s recent $15 million settlement with the SEC.

The drugmaker in January resolved Securities and Exchange Commission allegations that it failed to timely disclose talks with "potentially friendly merger partners" after rejecting a hostile joint tender offer from Valeant Pharmaceuticals International Inc. and Pershing Square Capital Management LP in June 2014.

The SEC invoked a little-used provision under the securities laws-1934 Securities Exchange Act Rule 14d-9-appearing to make a point about corporate communications with shareholders when there is an open invitation to buy their shares.

The Allergan case offers a "good glimpse at the commission's views on the murky interplay of the desire for confidentiality and the requirement of full disclosure in contested M&A deals," Georgetown University law professor Donald Langevoort told Bloomberg BNA. Langevoort teaches and writes about the federal securities laws.

The settlement is another reminder that dealmakers' affirmative disclosure requirements and their fiduciary duty to maximize returns for investors is a "dangerous intersection to navigate," Jonathan Shapiro, a Baker Botts LLP partner in San Francisco, told Bloomberg BNA.

"To some extent, all white knight discussions are subject to this sort of regulatory scrutiny because premature disclosure" is generally detrimental to both potential targets and their friendly suitors, said Shapiro, a litigator specializing in securities and corporate transaction cases.

According to Bloomberg Law data, this is only the SEC's second cease-and-desist action under Rule 14d-9 since 2000. In 2014, Lions Gate Entertainment Corp. agreed to pay $7.5 million to settle SEC allegations that it failed to fully disclose efforts to stymie a hostile takeover bid by Carl Icahn.

After Allergan rejected Valeant and Pershing Square's tender offer, it had a continuing obligation to disclose it was pursuing alternatives, said Adam Pritchard, a securities law professor at the University of Michigan. The company had a duty to disclose material changes, which included letting shareholders know it had started negotiating with other potential bidders, Pritchard said.

Allergan ignored repeated requests by commission staff to provide more information about the developments, according to the SEC's order.

"The SEC is sending a message to other companies that they need to comply when the staff says they have not disclosed enough," Pritchard said.

Allergan ultimately entered into merger discussions with Actavis plc, which acquired it in March 2015 in a deal valued at about $70.5 billion. The combined company became Allergan Plc.

Allergan spokesman Mark Marmur, when contacted for comment, reiterated a statement issued after the enforcement action that the SEC's order didn't make any finding of intentional wrongdoing or include any charges against Allergan Plc.

The SEC didn't respond to a request for comment.

Beyond the hostile takeover context, the SEC action highlights the tensions often at play in M&A negotiations-between the legitimate desires of M&A parties to keep negotiations confidential, and those of interested stakeholders, be they investors, customers, or federal regulators, said deal attorney Daniel Avery, director of Goulston & Storrs in Boston. "Balancing these interests is an inherent challenge in most M&A

transactions, and often the fix is neither simple nor static," he told Bloomberg BNA.

Another takeaway from the case is that dealmakers and their counsel should always "articulate clearly the rationale beyond disclosure judgments, and document their thinking in case it is later criticized on hindsight," Shapiro said.

According to a Paul Weiss release, hostile or unsolicited mergers are decreasing in the U.S. In 2014, 15.7 percent of U.S. public mergers were hostile, compared to 13.9 percent in 2015 and 13 percent in 2016.