The Deal
VOICE OF THE DEAL ECONOMY
VOL. 7 NO. 2 JANUARY 26 — FEBRUARY 8 2009

PROMISES, PROMISES

SOCIAL PROMISES ARE OFTEN MADE TO GET AN ACQUISITION THROUGH. WHAT HAPPENS NEXT IS A DIFFERENT MATTER

BY JUDITH R. THOYER

SEVERAL CASH MERGER deals in 2008 included social protections for the acquired business, including Wm. Wrigley Jr. Co.-Mars Inc., Anheuser-Busch Cos.-InBev SA and Dow Jones & Co.-News Corp. Although strategic acquisitions are none too popular right now, it's hard to write off this type of deal forever, since businesses will still want to consolidate or expand by acquisition. Thus it is worth thinking about social protections and how enforceable the promises made may be. Sometimes they're key to getting a deal done.

Moral duty
but hard to enforce

By social protections, we mean promises regarding post-closing matters such as where corporate headquarters will be; the merged company name; board members; identity of chairman and CEO; and whether charitable and community activities will continue. Such matters are usually considered in mergers of equals. Sometimes two companies are not even equal in size but nevertheless characterize their deal as an MOE to signify the importance of these social issues.

But the three mergers from 2008 were not MOEs, by size or by characterization. They were simply strategic cash acquisitions. Yet social protections were included in each deal and were critical to getting them done.

In these tough times, questions can be raised as to whether promises made in the optimism of a negotiated deal are enforceable when they are no longer of interest to the acquirer. A future board may believe its fiduciary duty requires that it not comply with earlier promises. Supporting a local charity, for instance, may no longer be in the best interest of a company experiencing financial difficulties.

The tension between getting a deal done and thus making social promises and the later fiduciary duty of the board leads to the question of how legally protected promises can, or should, be. At one end of the spectrum would be the agreed-upon name of the surviving public company. The new name would be embodied in an amendment to the certificate of incorporation and substantially protected from change, since both board and shareholder approval (assuming it's a Delaware corporation) are required to change the name. Compare that with a promise to keep headquarters in St. Louis, as in the Anheuser-Busch-InBev agreement, or of a "good-faith commitment" to keep open all 12 North American Anheuser-Busch breweries.

Beyond a moral duty to honor those promises, it's hard to see how they could be enforced legally. There's probably no one with standing even to attempt to enforce such an agreement, especially in light of a typical "no third-party beneficiary" clause.

In both the Wrigley and Anheuser-Busch deals, there are promises regarding future charitable and civic contributions. With Wrigley, the merger agreement promises that Mars will allow Wrigley (a standalone Mars subsidiary), to "continue with civic and charitable activities and contributions that ... are at a level and of the general nature consistent with the past practice." Similarly, InBev promised Anheuser-Busch to "preserve the company's heritage and continue to support philanthropic and charitable causes in St. Louis and other communities in which the company operates." Short of making specific charities third-party beneficiaries or setting up funded trusts, it's hard to see how these promises could be legally enforced.

At Dow Jones, promises about "journalistic integrity" made by acquirer News Corp. to the Bancroft family, whose vote was required for the sale, were critical enough to spur an effort to make them legally enforceable. A so-called editorial agreement was entered into at the time of the merger, setting up an independent, standalone special committee comprising "distinguished community or journalistic leaders" from outside the company. The committee was given, among other powers, approval rights over hiring and firing of the managing editor and editorial page editor of The Wall Street Journal and managing editor of Dow Jones Newswires. Key to enforceability was that the special committee won the right to enforce its mandate in court.

While the Dow Jones arrangement did not work exactly as intended with the first change that News Corp. chairman Rupert Murdoch made in the managing editor post, amendments were made to ensure better compliance. The approach is a model that may be useful in other situations when parties want an enforceable post-closing arrangement. It will take creative legal and business analysis, together with a seller in high demand, to push this concept beyond its use as a protection of journalistic integrity. ■

Judith R. Thoyer is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP.

The Deal (ISSN 1545-9878) is published weekly except biweekly in January, July, August and December by The Deal, LLC.