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Allergan Pays \$15 Million Fine For Failure to Disclose Merger Negotiations

The SEC recently announced a settlement with Allergan, Inc., pursuant to which Allergan agreed to pay a \$15 million penalty and admitted to violating requirements to update prior disclosure to reflect M&A negotiations in which the company was involved. This action arose in the context of Allergan's pitched battle against Valeant's hostile takeover attempt. Shortly after Valeant's offer launched in April 2014, as required by SEC rules, Allergan filed a Schedule 14D-9, recommending against the offer because it was inadequate and further stating that it was not "undertaking or engaged in any negotiations in response to the [o]ffer that relate to or could result in . . . any extraordinary transaction" involving Allergan or any of its subsidiaries. Although Schedule 14D-9 requires that such disclosure be updated promptly for any material changes, Allergan did not disclose that it was considering alternative transactions or engaging in negotiations – including possibly acquiring an unnamed target and being acquired by Actavis plc – until months later in some instances and only after the strong urging of SEC staff.

While this settlement does not create or imply any new obligations on the part of potential merger parties to disclose preliminary negotiations, it serves as a helpful reminder that once a party speaks about the existence or non-existence of such negotiations, it then has the obligation not to provide misleading information and promptly to update any prior disclosure as material changes occur. This is especially the case where disclosure has been made pursuant to an SEC filing that imposes antifraud and updating requirements, such as a Schedule 14D-9 or Schedule 13D. The Allergan action is just the latest in a series of SEC enforcement procedures against undue reliance on "boilerplate" disclosure in such filings.

For the SEC order, see <https://www.sec.gov/news/pressrelease/2017-16.html>.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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