

DRAFT

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Negotiating the Private Company Deal (Part II)

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Overview Of 2015 Presentation (Part I)

- Negotiating the “full disclosure” representation
- Negotiating the non-reliance provision
- Negotiating basic indemnification language and the definition of “damages”
- Negotiating language relating to the time limitations applicable to indemnification claims
- Negotiating the fraud exception to indemnification limitations
- Negotiating the “sandbagging” provision

Overview Of 2016 Presentation (Part II)

- Re-examining the “full disclosure” representation in light of newly available “deal points” statistics
- Re-examining the non-reliance provision in light of recent case law
- Re-examining “consequential damages” exclusions in light of newly available “deal points” statistics
- Negotiating the “no undisclosed liabilities” representation
- Negotiating the MAE carve-out for actions required under the acquisition agreement
- Negotiating regulatory covenants in an antitrust-sensitive transaction
- Negotiating the “residuals” clause in the confidentiality agreement

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Negotiating the “full disclosure” representation

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“Full disclosure” representation

- **Buyer’s draft:**

“Neither this Agreement nor the Disclosure Schedule contains any representation or other statement that omits to state a material fact necessary to make the representations or other statements therein, in light of the circumstances in which they were made, not misleading. Except for facts set forth in this Agreement or the Disclosure Schedule, there is no fact that has specific application to Target (other than facts relating to general economic or industry conditions) and that might reasonably be expected to materially and adversely affect the assets, business, prospects, financial condition or results of operations of Target.”

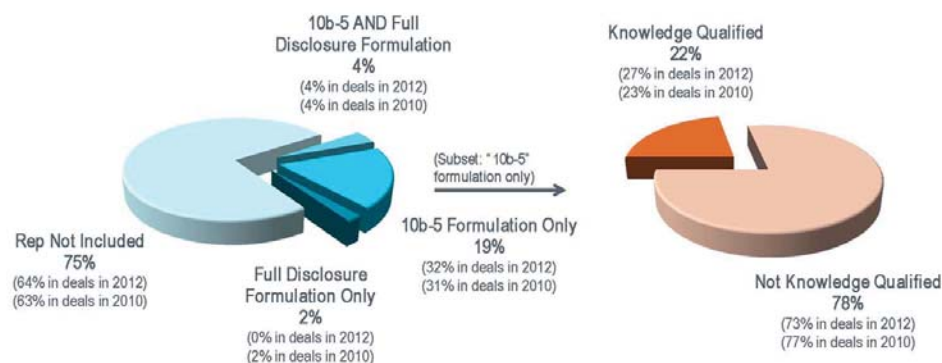
- **Target’s response:**

Delete the representation

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“Full disclosure” representation

“10b-5”/FULL DISCLOSURE REPRESENTATION



Reproduced from the Private Target M&A Deal Points Study of the M&A Market Trends Subcommittee of the Mergers & Acquisitions Committee of the ABA's Business Law Section (surveying transactions completed in 2014)

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"Negotiating the Private Company Deal: A Mock Negotiation of Today's—and Tomorrow's—Hot Issues"