Morgan Lewis

# 2022 JEGI CLARITY MEDIA AND TECHNOLOGY CONFERENCE

## What Happened? A Brief Review of Relevant Legal Developments Over the Past Two (or Was it Two Million?) Years

Robert W. Dickey

# Sample Material Adverse Effect Definition

"Company Material Adverse Effect" means any event, circumstance, development, change, occurrence or effect that, individually or in the aggregate, is or is reasonably likely to result in, a material adverse effect on (x) the condition (financial or otherwise), assets, liabilities, business or results of operations of the Company and its Subsidiaries, taken as a whole, or (y) the ability of the Company and its Subsidiaries to timely consummate the Closing (including the Merger) on the terms set forth herein or to perform their agreements or covenants hereunder;

provided that, in the case of clause (x) only, no event, circumstance, development, change, occurrence or effect to the extent resulting from, arising out of, or relating to any of the following shall be deemed to constitute, or shall be taken into account in determining whether there has been, a Company Material Adverse Effect, or whether a Company Material Adverse Effect would reasonably be expected to occur: (i) any changes after the date hereof in general United States or global economic conditions, including changes in United States or global securities, credit, financial, debt or other capital markets, (ii) any changes after the date hereof in conditions generally affecting the securities brokerage industry or the other industries in which the Company or any of its Subsidiaries materially engages, (iii) any decline, in and of itself, in the market price or trading volume of the Company Stock, any changes in credit ratings and any changes in any analysts' recommendations or ratings with respect to the Company or any of its Subsidiaries (it being understood and agreed that this clause (iii) shall not preclude Parent from asserting that any facts or occurrences giving rise to or contributing to such decline that are not otherwise excluded from the definition of Company Material Adverse Effect should be deemed to constitute, or be taken into account in determining whether there has been, or would reasonably be expected to be, a Company Material Adverse Effect), (iv) any failure, in and of itself, by the Company or any of its Subsidiaries to meet any internal or published projections, forecasts, estimates or predictions in respect of revenues, earnings or other financial or operating metrics for any period (it being understood and agreed that this clause (iv) shall not preclude Parent from asserting that any facts or occurrences giving rise to or contributing to such failure that are not otherwise excluded from the definition of Company Material Adverse Effect should be deemed to constitute, or be taken into account in determining whether there has been, or would reasonably be expected to be, a Company Material Adverse Effect), (v) the execution and delivery of this Agreement, the public announcement or the pendency of this Agreement (it being understood and agreed that this clause (v) shall not apply with respect to any representation or warranty that is intended to address the consequences of the execution and delivery of this Agreement or the public announcement or the pendency of this Agreement), (vi) any changes after the date hereof in any Applicable Law or GAAP (or authoritative interpretations thereof), (vii) any action or omission taken by the Company pursuant to the written request of Parent or Merger Sub or (viii) any acts of God, natural disasters, terrorism, armed hostilities, sabotage, war or any escalation or worsening of acts of war, epidemic, pandemic or disease outbreak (including the COVID-19 virus),

except in the case of each of clauses (i), (ii), (vi) or (viii), to the extent that any such event, circumstance, development, change, occurrence or effect has a disproportionate adverse effect on the Company and its Subsidiaries, taken as a whole, relative to the adverse effect such event, circumstance, development, change, occurrence or effect has on other companies operating in the securities brokerage industry or the other industries in which the Company or any of its Subsidiaries materially engages.[1]

[1] Agreement and Plan of Merger, dated as of February 20, 2020, by and among Morgan Stanley, Moon-Eagle Merger Sub, Inc. and E*Trade Financial Corporation.

# Interim Operating Covenants

Between the date of this Agreement and the Closing Date, the Target Company agrees to operate its business in the ordinary course consistent with the past practice.

- In many cases, buyers successfully argued that target companies had breached this covenant by taking actions in response to the pandemic, such as terminating employees or shuttering locations
- Parties quickly adapted, and agreements entered into after the WHO declared a global pandemic tended to qualify the target company's obligation by an efforts standard (i.e., the target would use its reasonable efforts to operate in the ordinary course), and/or provide targets with broad flexibility to take any actions in response to the pandemic or legal requirements related to the pandemic
- As the pandemic continued, however, the pendulum began to swing back, with buyers succeeding in obtaining tighter covenants on the theory that actions taken in response to the pandemic should now be reflected in the target company's ordinary business operations.

# Representation and Warranty Insurance

- Expansion in use:
  - Smaller deals
  - Deals not involving private equity sponsors; more strategic buyers are using
- Expansion in scope: "no indemnity", public company-style deals becoming more common
- Results
  - Premiums increasing
  - Timelines for RWI process extended as underwriting terms are stretched
- Increased focus on data privacy and cybersecurity—some underwriters will insure only if a primary cybersecurity policy provides this first line of defense

# Data Privacy

- China's new Personal Information Protection Law (the "PIPL") became effective November 1, 2021
  - The PIPL applies to data processing activities within China
  - The PIPL also applies to data processing activities outside China when:
    - The purpose is to provide products or services to individuals located in China
    - Analyzing or assessing the behaviors of individuals located in China
  - Dawn raids, penalties, and civil remedies for breaching PIPL
  - Notice to data subjects if personal information will be transferred to the buyer in an acquisition
  - Fines are significant: up to 5% of annual revenue or 50 million RMB (approx. $7.9 million USD)

# Cross-Border Data Transfers

- Transfers out of China
  - Separate consent of data subjects is required
  - Data localization and government-led security assessment requirements for certain companies and personal information
  - Security self-assessment requirement for all companies under the recent draft regulation
  - Standard contractual clauses similar to the EU model should be published by the authorities soon

# Data Privacy – What To Do?

- Evaluate privacy policies and related procedures and user interfaces
- Implement required consent mechanisms when China-related data involved
- Update incident response plans to include PIPL requirements
- Stay tuned for upcoming contractual clauses
- Evaluate potential impact of any need to localize data in China

# HSR and Other Antitrust and Competition Developments

- "Brief" suspension of early termination
  - Announced in February 2021; will it return?
- FTC "close at your own risk" letters
  - Scrambles the certainty of expiration of a waiting period, with minimal practical impact
- Big Tech – and tech in general – in the crosshairs
- Vertical enforcement
  - More agency scrutiny of nontraditional theories of harm
  - "Structural" antitrust theories; "too big to exist"
- Focus on labor markets
  - Employee non-compete, no-poach, and wage-fixing agreements

# SPAC Attack!

- SPACs and subsequent de-SPAC transactions helped fuel record-breaking M&A activity in 2020 and 2021
- SPACs have begun to run into headwinds, and the number of SPAC IPOs and de-SPAC transactions has dropped precipitously
- Multiple reasons for this:
  - Increased SEC focus, including on use of projections and conflicts of interest
  - Large number of SPACs pursuing limited number of public-ready targets
  - Market underperformance of post-de-SPAC public companies – due to overvaluation in frothy market?
  - Pressure on sponsor economics
  - Pressure on/contraction of PIPE market
  - *Multiplan* decision

# Biography

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Robert W. Dickey advises US and non-US based companies with respect to their most important mergers, acquisitions, divestitures, and other strategic transactions. He also counsels executives, in house counsel, and boards of directors on a wide range of critical corporate matters, including fiduciary duties, corporate governance, and securities law compliance.

Rob has represented a large number of companies in the media and technology industries, and also has significant experience in the automotive and mobility, chemical, food and beverage, industrial, life sciences, and risk management industries.

Rob oversees the firm's M&A Academy, a series of tailored webinars designed to provide a comprehensive M&A overview for M&A professionals and others who deal with M&A issues. He speaks frequently on trends in the M&A legal arena and the media and technology industries.

# THANK YOU