Remarks by Joele Frank

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Joele is the founder and managing partner of Joele Frank, Wilkinson Brimmer Katcher. Founded in 2000, the firm has ranked #1 in M&A since 2013. Among her many professional accolades, Joele has been named to PRWeek's Hall of Fame and Inside PR's Hall of Fame as an All-Star for Investor Relations. She has appeared on PRWeek's PR Power List of the 25 top PR industry leaders and was selected for the 2011 National Association of Corporate Directors Directorship 100.

Joele Frank
Managing Partner
D 212-355-4449
E jfrank@joelefrank.com

Good evening. It's a pleasure to join you here tonight.

I may be one of the few non-lawyers here in the room. But—as someone who has spent many years working closely with legal strategy teams on M&A transactions—I feel right at home among you.

Working in financial communications for nearly 30 years, I've seen the M&A environment change drastically—and in most ways, change for the better.

In the 80s, when I started out it was almost as if Corporate America and Wall Street hadn't changed their ways since the Roaring Twenties. The attitude seemed to be that corporate leaders could do no wrong—and that their M&A teams were infallible. Especially the lawyers.

Collaborating with legal counsel has always been part of the job. However, when I began my career, "collaboration" had a very different meaning. Those were the days when one of the top lawyers actually said to me: "PR is too important to be left to the PR people." Back then, the lawyers wrote everything—not just the transaction documents, but the press releases and the talking points, too...and they handed it all to the communications teams, just in case we got any phone calls from reporters.

The stakes in M&A have always been high—but, back then, the tech was definitely low. The news was tapped-out on a ticker-tape machine. In our office, there was a guy—Phil—with a pair of scissors who would snip off each bulletin on the ticker tape, tape the ticker back together, photocopy the articles and then deliver each one to the PR people working on the transaction, that then had to be faxed to the client, lawyers and bankers.

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We all lost a major revenue stream when faxing went out of style and was superseded by the internet.

In those days, we'd have to fax documents and messenger marked-up drafts all over the country to review and revise them with the clients and lawyers. We'd stand over the fax machines and count down—"four, three, two, one...."—before we hit the "send" button to deliver press releases, simultaneously, to the handful of media outlets that really mattered: Dow Jones, UPI, Reuters and AP. Hard to believe: There was no Bloomberg back then.

I actually came into the financial communications world in a roundabout way. I had studied biochemistry in college—but I quickly realized that it was hard to get the adrenaline flowing as a biochemist. So I got my MBA at night, and started as a financial analyst at Allied Chemical evaluating their capital allocation projects.

From there I went to the Treasury department of AT&T—the old AT&T, when it was still "Ma Bell," before the breakup. I was part of the group that, financially, broke up the Bell system, separating it into seven separate Bell operating companies.

Almost nobody remembers the scale of the old "Ma Bell". At that point, it was the equivalent of 2% of the U.S. labor force and 1 percent of the country's entire Gross National Product. I remember the night that I was calculating the division of debt of the Bell system across the operating companies using a double-leverage calculation—whatever that was—and my estimates were just about right...but not quite. I was off by half a billion dollars. And my boss said, "Half a billion? Well, that's close enough."

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That was then, this is now. We've certainly seen a total change in the M&A environment over the past 30 years or so. Nowadays, communications definitely has a seat at the table among corporate leaders. Everyone knows the importance of working together—with our legal talent paired-up with our communications talent—as we advocate for our clients. Because we all know that one of the most critical factors to a transaction is establishing and reinforcing credibility.

We share a common goal, a common perspective, and—occasionally—even a common language. In fact, I often use a legal phrase that's come to be known as the "Joele Frank Miranda Rule." I tell our M&A clients: As an executive of a public company, you're entitled to legal, investment banking, and public and investor relations counsel...but, everything you say, can, and will be used against you in the court of public opinion!

In today's investing environment, transactions don't happen anymore at the speed of fax machines and rotary phones: Money moves at the speed of electrons—and in a 24/7 environment—More than ever—a strong communications strategy is an integral part of making sure a transaction succeeds.

And so it's vital, in M&A, that our legal and communications teams work together more closely than ever.

Now, of course, there's no substitute for a well-thought-out legal strategy. That's where your knowledge and judgment will always be indispensable.

Underscoring the importance of coordination and working together, I remember a transaction where, prior to going public, the CEO exercised his options to buy the stock but didn't sell them in the market. When the transaction went public, the Wall Street Journal called me and asked if he was insider trading. When we followed up with the CEO, he was astonished, telling me 'This is 100 percent above board. I talked to three different law firms. Why is the Wall Street Journal even calling about this?'—I responded—carefully—well…how many PR people did you talk to?

This is a classic example where, although something is legal, it may be a PR problem.

This leads us to another "Joele-ism": *A good communications strategy can't make a deal—but a bad communications strategy can certainly break one.*

One thing has remained the same, however, from the 1980s to today. PR is still the last thing that weary executives, lawyers and investment bankers really want to think about—yet it's the very first thing that the world sees.

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To put the scale of this challenge into perspective: Consider how the growth of M&A has intensified the pressures across the entire financial, legal, regulatory and communications spectrum. In 1987, there were about 5,200 M&A transactions worldwide, with a total value of just over $500 billion. By 2015, the number of transactions had multiplied about nine-times-over, to more than 45,000 . . . worth a total of $4.7 trillion—with almost half of that, about $2 trillion, in the United States alone.

Change has swept through four areas, broadly speaking:
1) the rise of cross-border transactions and the inherent complexities as different legal and cultural environments converge;
2) the evolving media landscape;
3) the increased importance of corporate governance driven by shareholder activism; and
4) the ongoing scrutiny and oversight by regulators.

Let's consider each one of those four areas, in turn.

Given this audience of legal experts and lawyers from around the world, I'd like to start by discussing the increasingly international nature of M&A and notably, a recent situation that I think clearly illustrates the challenges that we face as we work across different countries, cultures and legal structures.

We worked with Teva Pharmaceutical during its attempt to acquire Mylan. Here, Mylan was using a Stichting, which is a takeover defense tactic similar—from my perspective—to a shareholder rights plan in the U.S. For me this was new and became a significant challenge as we were communicating with U.S.-based investors.

Now I know that most of you in this international audience probably know a great deal about Stichtings...I can assure you that PR people and journalists here in the United States do not. We had literally never heard of them.

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Following many, many hours of calls with Dutch lawyers patiently explaining exactly what a Stichting was and how it worked, we then went out to explain it to U.S. investors.

Even today, I find it hard to understand how—with a single-mailbox in the Netherlands, its tax structure in the United Kingdom and most of its operations, including its headquarters, in the United States—Mylan was protected by Dutch law.

We certainly tortured our Dutch legal counsel as we strategized together about how we could potentially beat the Stichting. We had to get reporters interested in the topic, beyond forcing them to sit down and read law books, so—to make it sound really interesting—we explained that we didn't want Mylan shareholders get schtupped by the Stichting!

We were educating shareholders, successfully driving media coverage about Mylan's corporate governance and were making progress in our campaign against the Stichting. However, Teva got a great opportunity to acquire Allergan Generics, which they had coveted for years. It stopped its legal actions, withdrew its bid for Mylan and instead, announced a $40 billion transaction to acquire the Allergan Generics business.

This case helps to illustrate the legal, governance, cultural and geographic differences inherent in international M&A—which have become far more important, given the rise of global corporate operations.

Second: Over the past 30 years, the media landscape has changed significantly.

In the old days: everybody got their news from a handful of newspapers that were published once a day. Today, we're operating in a 24/7 media environment. There are more media outlets than ever—even if there are only a handful of really knowledgeable M&A reporters. The "talking heads" might not have much solid information, but they're bound to be out there talking. One bad article, or one controversial quote, can spread across the globe like the cold virus through a school class, provoking other attacks and compromising a transaction's path to completion.

Then there's a competitive tension amongst journalists. They're all speeding to get a scoop. Journalists, analysts and opinion leaders are forced to be less focused on the substance of industries and sectors than they are on their own headlines and deadlines. From behind-the-scenes information to rumors of a failed strategic-alternatives process, sensational scoop-driven stories can derail a transaction. As the news industry has come under financial pressure, with fewer and fewer traditional outlets—and in turn, jobs—the pressure on journalists has increased tremendously.

Nowadays, some journalists are compensated based on how much their scoops have moved a stock price—so they are incentivized to be first with a story and break news that moves the market.

With the rise of social media—with blogs, message boards, tweets and retweets—there are far more ways for key messages to reach audiences...but using social media has created an entirely new set of legal and disclosure issues.

Board members now get instantaneous information from multiple sources. So from the very beginning of the discussion about a possible transaction, we try to ensure that our messaging is strong, consistent and controlled.

With constant commentary and media flow, M&A teams need to be prepared to react immediately with "contingency communications"—whether a reactive statement or a standby press release–ready to be used in the same news cycle.

That brings us to the third challenge: Consider the changing role of corporate governance—especially in the context of intensified shareholder activism.

Now we can't talk about M&A without talking about activism—because its rise has contributed to a seismic shift toward short-term returns and it has had a profound impact on the behavior and approach of management teams.

In the 80s, we saw the rise of corporate raiders, whose use of leveraged buyouts changed the M&A landscape. Amid the backdrop of friendly transactions, came the threat of hostile takeovers, forcing companies to put innovative defensive measures in place. "Poison pills" and golden parachutes—terms that are now commonly accepted—were previously unheard-of. Proxy fights and white papers were scarcely a thought among many of the corporate raiders—figures like Carl Icahn and Nelson Peltz.

Over time, these activists became more sophisticated, adapting to companies' new defensive measures and realizing that they also needed to persuade other investors. They are writing detailed white papers, publishing presentations, issuing press releases and shareholder letters, and hiring search firms to identify credible director candidates.

Fast-forward to today: While we still see some of the same names—Icahn and Peltz—they're still here—but, there's a whole crowd of new activists—both the dozen or so celebrity activists and a horde of ankle-biters who are working to make their name.

Activists today have become as sophisticated in their communications as many of the world's largest companies. Today, those activists hire their own suite of advisors. The stigma of being on a hostile board slate is fading and now they nominate slates of former CEOs and top managers from other major corporations, rather than just their own fund representatives, personal physicians or attorneys. They have deep relationships with industry reporters, and use the media to amplify their demands for change. Also, activists are no longer considered the black hats of the financial world. We have mutual funds putting out "RFAs"—a request for activists—calling and pitching a company to be a target for "change". Even five years ago, that would have been unheard of.

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Given this overlap of shareholder activism and M&A activity, greater communications challenges now confront every party in a transaction. Every company must view every possible action through the lens of: Does this win me a vote, or lose me a vote?

That has led to another "Joele-ism" that I often tell my clients: If it would feel really, really great or you desperately want to say something, then it's probably a bad idea to do it. Executives need to be very, very careful about what they say, both publicly and privately. Quotes can be taken out of context, and CEOs can face intense investor backlash if they don't choose their words carefully.

Companies and dealmakers must establish credibility with their key constituencies, particularly investors and analysts, and ideally this has begun long before announcing a transaction. As I always tell clients: You need "credibility for do-ability."

A company's credibility has to be so strong, that it creates an environment that makes it easier for people to buy in...credibility whereby a third party already understands the rationale for a transaction and is willing to come out and support it publicly.

The US Airways/ merican transaction was one where we were able to create an environment like that. We represented US Airways in its multi-year merger process with American Airlines and we communicated to the pilots, flight attendants and the other labor unions continuously. In part due to our sustained communications plan and the solid credibility of the US Airways management team, we were able to get American Airlines' labor unions to support the transaction well prior to American Airlines' management buying in. That was unprecedented. This created an environment for regulatory approval. Even though the transaction was initially challenged by the Justice Department, there was an outcry to find an acceptable solution so that the transaction could be completed.

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That brings us to the fourth challenge: the evolving regulatory environment.

Increasingly, regulators are one of most important audiences in M&A. We've seen the rise of hot button regulatory and political issues. There has been significant consolidation in the healthcare, technology and—at the moment—agriculture industries. The fact is, Federal regulators and state governments have become more involved than ever before. How important are they? Thus far in 2016 alone, more than $300 billion of announced transactions, globally, have been withdrawn due to regulatory threats or actions. Elected officials and federal and state regulators are paying close attention, beginning on Day One, to M&A: They often voice their support for, or their opposition to, a transaction right when it is announced. Because of this, reaching out to the right people is now one of the first things that companies need to do—anticipating and ideally, pre-empting any sort of negative regulatory action through third parties.

When we were representing Sirius in its merger with XM, the antitrust issue was obvious given the perception that the satellite radio industry was shrinking from two players to one. Notwithstanding the hundreds of radio stations and dozens of broadcasting companies across the US—We knew that we needed an additional third-party supporter. A unique fact was that the Catholic Church had a channel on Sirius—so we worked to gain their support and solicited an op-ed from Cardinal Egan.

I've been in the business for 30 years and I'm always looking for third-party supporters. This is the first time—and I am confident it will likely be the last time—that I will ever get to say that I had God on my side in a transaction.

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Here's another thing that I've learned through many years of dealing with complex transaction. Many people might imagine that hostile M&A—either on the defense or offense side—is the most difficult to communicate. Of course, it is my favorite—so call me—either side, by the way.

However, in my experience, friendly M&A is—by far—the most challenging.

Yes—most friendly M&A announcements have a set of core documents and have become far more standardized. But each company has different objectives—and, with eight or more advisors in a transaction, all parties have to play nice. This balance is even more difficult in a merger of equals where each side is arguing whose name goes first in the headline or in the body of the press release.

In friendly M&A, there are a lot of constituencies that need to be managed and it can be very unpredictable. Everything that goes on in a hostile also happens in a friendly—but it's behind-the-scenes.

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Looking back at how far we've come and how much M&A has changed since I began, one thing is for certain, it will continue to evolve and we'll need to continue working closely to steer our clients toward success. Providing sound legal advice and delivering the entire range of messages—in an integrated fashion—will continue to be crucial to helping our clients succeed.

It's been a pleasure to share these thoughts with you this evening, and I'm looking forward to our work together in the years to come. Thank you very much.