



On May 16, 2016, Office Depot and Staples announced that they were terminating their planned merger after a court issued a preliminary injunction blocking the merger for anti-trust reasons. Using Matterhorn's technology to dive deeply into the deal's structure while comparing comprehensively across the market provides valuable insights into this development.

The two parties entered into a merger agreement on February 4, 2015 whereby Staples was to acquire all of the outstanding common stock of Office Depot. Office Depot shareholders were to receive, for each share of Office Depot stock, \$7.25 in cash and 0.2188 per share in Staples stock at closing. The impending merger was valued at approximately \$6.3 billion based on the equity value of Office Depot. As a result of the termination, Staples must pay Office Depot a reverse termination fee of \$250 million by May 19, 2016.

Pursuant to the merger agreement, the transaction was to be completed unless anti-trust approvals were not obtained by that date, in which case the merger agreement was to be automatically extended until February 4, 2016. In December 2015, the Federal Trade Commission (FTC) notified Office Depot and Staples that it intended to block the proposed merger. In January 2016, Office Depot and Staples extended the merger agreement termination date to March 16, 2016. The merger agreement required the parties to use their reasonable best efforts to take the actions required to cause the expiration or termination of the waiting periods under the Hart-Scott-Rodino Act and other anti-trust laws to allow the transaction to close. This reasonable best efforts standard was the predominant standard used by the parties, which occurred in 83% of the transactions in 2015 valued at over \$200 million.

In 80% of mergers involving the acquisition of a public company in 2015 with a transaction value of \$200 million or more, either party had a right to terminate the merger agreement upon a court or governmental entity issuing a final order, decree or injunction prohibiting the transaction. In these 152 transactions, only three have termination fees, but 24 have reverse termination fees (representing only 15.8% of the transactions). The Staples-Office Depot merger agreement does have this type of reverse termination fee, but ultimately the Staples-Office Depot transaction was terminated under a different provision: the right to terminate for failure to close by the termination date.

Of the 189 public merger transactions filed in 2015, all of those transactions have a right to terminate for failure to close by an outside date. Of those transactions, almost half have a reverse termination fee. The average reverse termination fee to be paid is \$319.2 million. The reverse termination fee of \$250 million payable by Staples is equal to 3.97% of the equity value of the transaction, which is standard for 2015.

There were 12 large public merger transactions terminated in 2015. Of those, half have reverse termination fees, of which the average amount of the fee is \$711.5 million; however, as a percentage of enterprise value, the average is only 1.81%, which is significantly less than the Staples reverse termination fee. The Staples-Office Depot transaction is only one of three transactions in 2015 in the retail industry where a reverse termination fee is payable. Of those three transactions, the Staples reverse termination fee of \$250 million is similar to the average value of \$246.7 million.

The Staples reverse termination fee appears standard for the industry and market; however, for terminations based on regulatory factors, it is not the norm to pay a reverse termination fee. As previously mentioned, a reverse termination fee is only payable in approximately 16% of the cases. It is especially unusual to have a reverse termination fee in a transaction where there is a high likelihood that the transaction will undergo regulatory scrutiny. This is especially true in this transaction since the parties tried to merge several years ago and were denied the merger at that time. Both Office Depot and Staples have indicated that they do not plan to appeal the court's decision and plan to move forward with their respective businesses.

Matterhorn's M&A database quickly demonstrates the peculiarities of this terminated merger while assisting attorneys to learn from both its mistakes and pitfalls as they structure future deals.

