

# Ballard Spahr Gears Up for a Busy 2019



**Barbara Lano Rummel**  
Partner  
Ballard Spahr LLP



**Mary J. Mullany**  
Partner  
Ballard Spahr LLP

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Barbara Lano Rummel focuses her practice on M&A and private equity transactions with a sector specialty in life sciences. Mary Mullany concentrates her practice in the areas of securities offerings, M&A, corporate finance, and more. What follows is an excerpt of a conversation with both women about the industry today and what is expected going forward.

## How would you characterize the dealmaking environment today?

**RUMMEL:** This is a great time to be a seller. Buyers have cash, access to debt, and an appetite for growth through acquisition. There is high demand for quality deals, and our buy-side clients are facing intense competition for those deals.

**MULLANY:** In my practice, I am seeing more alternatives available to both privately held and publicly traded companies to engage in strategic business combinations. With the maturation of the SEC's rulemaking regarding the use of a "test the waters" confidential marketing process, the steady interest of cross-over funds in investing through a private-to-public transition, and (in some industries) the use of reverse mergers to combine two companies more successfully than in the past, there are alternatives present, particularly when the IPO window closes. My practice focuses on healthcare and biotech companies, and frequently the public markets are not available to them; so these alternatives are useful in advancing the development of new technologies.

## What are the biggest trends you are seeing in M&A today?

**MULLANY:** I am seeing more private equity investors participating in cross-over funds or staying invested in companies through the conversion to publicly traded companies. I see the conversations happening earlier in the process than in the past—to see a potential transition to a publicly traded company as not necessarily the exit strategy by the investors, but as a way to continue to

deploy capital alongside other public investors. In the past I felt that IPO or M&A were mutually exclusive exit strategies; today I am seeing more melding of these alternatives.

The SEC recently revised the definition of "smaller reporting company" to allow many more companies to take advantage of the more streamlined disclosure obligations. With the addition of the SEC disclosure simplification rules, the status of a public reporting company may be an interesting choice to more businesses, particularly in the biotech and healthcare industries, where capital financing transactions or M&A are needed for a longer period due to development and regulatory clearance hurdles.

**RUMMEL:** The biggest trends we have seen in M&A are increased speed of transaction process, nonexclusive negotiation with multiple buyers, and seller-friendly indemnification structures supported by representation and warranty insurance. These trends are being driven by the seller's leverage in the marketplace. The deal process has been condensed and pushed to conclude in record time. Sellers are demanding the quick process so that if one buyer drops out, they can move on to the next potential buyer without delay or interruption. Exclusivity is rarely granted and—when it is—the period is often limited to 30 days. This puts pressure on buyers to conduct their due diligence quickly. The dominance of representation and warranty insurance, in both private equity and increasingly in strategic deals, has become a weapon for sellers to demand no post-closing indemnification and is accelerating the pace of negotiating transaction

agreements. Buyers who are not prepared to work on a non-exclusive basis within this condensed timing and indemnification structure are often excluded from the process and are losing deals.

**What are some of the common challenges private equity firms face today, and how can you help them overcome these challenges?**

**RUMMEL:** Due to increased competition among buyers, each indication of interest needs to be thorough and reflect a buyer deal team that is prepared to close the transaction quickly. Because Ballard Spahr's M&A team has so much experience and depth in middle market deals, we are well-positioned to help clients critically evaluate opportunities and position the bid for success. We help clients anticipate and prepare for the deal process. Buyers need to devote substantial resources to due diligence on the front end in order to deliver an indication of interest that shows they value the deal and can proceed quickly to closing the transaction. We also guide our clients through the representation and warranty procedures early in the transaction process to avoid later delays or surprises.

**MULLANY:** Most of my practice involves representation of issuers, rather than private equity investors. I find that it is helpful for issuers to engage in conversations with private equity investors early on to assess the anticipated term of the investment and any investor-side obligations that the issuer needs to consider. I also spend time counseling investors as to the impact on them of public company investments, particularly for smaller reporting companies.

**What value add do you bring to the private equity industry?**

**RUMMEL:** Our focus on middle market private equity and the industries in which our strategic M&A clients participate positions Ballard Spahr to anticipate issues and address them head on early in the process. Because we have worked with private equity clients for many years and through a number of cycles, we understand the issues that are most important to these clients and can help them assess risk efficiently. With more than 650 lawyers in 15 offices, we can tap into our internal experience

with issues such as tax, data privacy/GDPR, antitrust, healthcare regulation, environmental and intellectual property. Rep & warranty insurance deals can be alarming to strategic buyers who are not accustomed to this indemnity structure. Bidders will be eliminated from a deal process if they cannot quickly adapt. We help manage client expectations and guide them through the process.

**MULLANY:** With the 2018 addition of Lindquist & Vennum, we have the ability to help our clients test the financeable alternative market through M&A or significant investments by private equity companies. We really run the gamut now and have the ability to work with clients through their life cycles. That is the practical value we bring to customers.

**What changes do you expect in the private equity/M&A industry over the next year?**

**MULLANY:** I continue to see that private equity investors are looking to hone their investment decisions by teaming up with other investors in M&A transactions, deploying capital as efficiently as possible, and focusing more on industry specialization. Because our attorneys understand our clients' businesses and industries, we can also assist strategically—helping to connect clients with financing sources and other needed resources and identifying potential deals that align with their goals.

**RUMMEL:** Although dealmakers are always watching for tax law changes and the effect of increasing interest rates on access to debt, we expect that deals will be more influenced by technology and other market challenges in certain industries, such as the effect of tariffs on manufacturing and the disruption occurring in the retail sector. Successful buyers will look for value opportunities arising out of those changes. We strive to partner with our clients to seek and capitalize on those innovative opportunities.

**CONTACT INFO**

**Barbara Lano Rummel**  
Partner | Ballard Spahr LLP  
Tel: (612) 371-3940  
rummelb@ballardspahr.com

**Mary J. Mullany**  
Partner | Ballard Spahr LLP  
Tel: (215) 864-8631  
mullany@ballardspahr.com

**Ballard Spahr**  
LLP