

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90208 / October 15, 2020

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4190 / October 15, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-20125

In the Matter of

ANDEAVOR LLC

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Andeavor LLC (“Respondent”), successor by merger to Andeavor (“Andeavor”) and a wholly owned subsidiary of Marathon Petroleum Corporation (“Marathon”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹:

SUMMARY

1. This matter involves Andeavor's failure to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that stock buyback transactions were executed in accordance with management's authorization.

2. In 2015 and 2016, Andeavor's Board of Directors authorized the company to spend \$2 billion for share repurchases. This authorization required Andeavor to comply with a policy that prohibited the company from repurchasing stock while it was in possession of material non-public information.

3. Andeavor did not, however, have internal accounting controls sufficient to provide reasonable assurance it was complying with this policy such that buyback transactions were executed in accordance with management's authorization. Specifically, Andeavor lacked an effective process for obtaining an accurate and complete understanding of the facts and circumstances necessary to determine whether it was in possession of material non-public information and therefore prohibited from engaging in buyback transactions. As a consequence of this internal accounting controls failure, Andeavor engaged in buyback transactions that were not executed in accordance with management's authorization.

4. On February 21, 2018, Andeavor's then-Chairman and Chief Executive Officer (Andeavor's CEO) directed the company's Chief Financial Officer to initiate a share buyback to repurchase \$250 million of shares over a period of several weeks. At the time of this direction, Andeavor's CEO was scheduled to meet with his counterpart at Marathon two days later to resume the confidential discussions about Marathon's potential acquisition of Andeavor at a significant premium that had taken place in 2017 (but were suspended in October of that year).

5. On February 22, 2018, Andeavor's legal department approved a Rule 10b5-1 plan to repurchase \$250 million of stock. It did so after concluding, based on a deficient understanding of all relevant facts and circumstances regarding the two companies' discussions, that those discussions did not constitute material non-public information.

6. This lack of understanding was the result of Andeavor's insufficient internal accounting controls. Andeavor used an abbreviated and informal process to evaluate the materiality of the acquisition discussions that did not allow for a proper analysis of the probability that Andeavor would be acquired. Andeavor's informal process did not require conferring with persons reasonably likely to have potentially material information regarding significant corporate developments prior to approval of share repurchases. As a result, for example, despite Andeavor's CEO's leadership role at the company and the fact that he was the primary negotiator with

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Marathon, no one involved in Andeavor's process discussed with him the prospects that Andeavor and Marathon would agree to a deal. Because they did not do so, the company failed to appreciate that the probability of Marathon's acquisition of Andeavor was sufficiently high at that time as to be material to investors. In short, Andeavor did not have internal accounting controls that provided reasonable assurance that its buyback would be executed in accordance with its Board's authorization.

7. On February 23, 2018, Andeavor executed the Rule 10b5-1 plan that its legal department had approved. Pursuant to that plan, Andeavor repurchased 2.6 million shares of its stock from investors at an average of \$97 per share in February and March 2018. About six weeks after initiating the buyback, and two weeks after completing the buyback, the two companies' CEOs reached an agreement in principle for Marathon to acquire Andeavor. On April 30, 2018, Andeavor publicly announced that it would be acquired by Marathon in a deal valuing Andeavor at over \$150 per share.

RESPONDENT

8. **Andeavor LLC** (successor by merger to Andeavor) is a Delaware limited liability company and a wholly owned subsidiary of Marathon. Andeavor was acquired by Marathon in 2018. Prior to the acquisition, Andeavor was an energy company headquartered in San Antonio, Texas. Andeavor operated an oil refining system, sold refined products and operated retail stores. When it was an independent company, Andeavor had a class of securities registered pursuant to Section 12(b) of the Exchange Act and its shares were traded on the New York Stock Exchange.

FACTS

A. Andeavor and Marathon Discuss a Potential Business Combination in 2017

9. Andeavor's CEO first discussed a potential business combination with Marathon's Chairman and CEO (Marathon's CEO) in March 2017. Over the following seven months, Andeavor and Marathon engaged in significant discussions about a potential business combination.

10. In August 2017, Andeavor and Marathon executed a confidentiality agreement and began to share confidential financial information with each other. Each company assembled a team of subject matter experts to assess the potential synergies that a combined company would produce, and discussed the potential transaction with their respective investment bankers and legal counsel. By the end of September 2017, the two companies had conducted thorough analyses of potential synergies and concluded that if they combined their businesses into one, it would be substantially more profitable than if they were to continue independently. The companies took significant precautions to maintain the confidentiality of their discussions, and there was no public speculation that they were considering a combination. By October 2017, Andeavor and Marathon had prepared a timeline that established a schedule for publicly announcing a deal in four to six weeks if discussions progressed favorably, and Marathon had begun drafting a merger agreement. At that time, Marathon had expressed interest in paying a 15% premium for Andeavor shares. Andeavor was seeking at least 20%.

B. Andeavor and Marathon Agree to Suspend their Discussions

11. On October 27, Marathon's CEO asked Andeavor's CEO to suspend their discussions. To fund an acquisition of Andeavor, Marathon expected to issue new shares. The amount of shares Marathon would issue in exchange for each Andeavor share would be based on an "exchange ratio." This was the ratio of Marathon's share price to Andeavor's share price plus a premium. At any given premium, the higher that Marathon's share price was relative to Andeavor's, the fewer shares Marathon would have to issue. While a deal at either a 15% or 20% premium would have been immediately accretive to Marathon's earnings per share, it would have diluted Marathon's cash flow per share (CFPS) at that time.

12. Marathon's CEO told Andeavor's CEO that he was concerned about the CFPS dilution. Andeavor's CEO knew that Marathon had announced its plan to close two transactions in the first quarter of 2018 that he believed had the potential to improve Marathon's share price. If Marathon's share price were to increase relative to Andeavor's, Marathon would have to issue fewer shares to fund an acquisition of Andeavor. Depending on how much Marathon's share price were to increase relative to Andeavor's, a deal could be less dilutive or even accretive to Marathon's CFPS. Andeavor's CEO agreed to suspend their discussions. He told Andeavor's financial advisor that he believed the discussions would likely resume in early 2018.

C. Andeavor and Marathon Resume their Discussions

13. Following their suspension of discussions, both companies monitored the potential exchange ratio as their share prices changed. Andeavor received weekly updates on the exchange ratio from the company's financial advisor. By late-January 2018, the ratio had fallen significantly as Marathon's share price increased.

14. On January 30, Marathon's CEO asked Andeavor's CEO to resume their discussions about a potential business combination, and the latter agreed. They planned their next in-person meeting to occur on February 23. Because the companies had previously done a significant amount of work to prepare for the acquisition in 2017, Andeavor's CEO recognized the companies did not "have to start over" in their discussions; they could simply "refresh" the prior work.

15. On February 11, Andeavor's CEO and Andeavor's then-Chief Financial Officer spoke with the company's financial advisor to prepare for the February 23 meeting. The discussion materials showed that changes in the two companies' share prices since October 2017 had resulted in such a substantial decline in the exchange ratio that a deal would likely be immediately accretive to Marathon's earnings and CFPS at up to a 40% premium to Andeavor's share price. This suggested that the CFPS dilution issue that Andeavor's CEO believed had led Marathon to suspend their earlier discussions would no longer be an issue.

16. Later that day, Andeavor's CEO informed Andeavor's Board of Directors, "Significant progress was made on Project Ocean [their code name for the discussions with Marathon] during the second half of 2017. Although we did not achieve our desired objectives, we are still positioned to advance this opportunity in 2018." The "desired objectives" were for

Andeavor to form a business combination with Marathon. On February 14, Andeavor's Board of Directors expressed support for resuming discussions with Marathon.

D. Andeavor's 2018 Buyback and Insufficient Internal Accounting Controls

17. On February 21, 2018, Andeavor's CEO directed the CFO to initiate a share buyback to repurchase \$250 million of shares.

18. In 2015 and 2016, Andeavor's Board of Directors had authorized the company to repurchase, in the aggregate, \$2 billion of shares. The company had conducted repurchases pursuant to that authorization from time to time. Any repurchase, however, was required to comply with Andeavor's securities trading policy. Among other things, this policy prohibited Andeavor from buying, or entering into a Rule 10b5-1 plan to buy, its securities while it was in possession of material non-public information.

19. Andeavor failed to design and maintain internal accounting controls sufficient to provide reasonable assurance that its 2018 buyback would be executed in accordance with its Board's authorization.

20. Andeavor's legal department approved the company's Rule 10b5-1 plan to repurchase shares on February 22, 2018. It did so after concluding, based on a deficient understanding of all relevant facts and circumstances regarding the two companies' discussions, that those discussions did not constitute material non-public information at that time.

21. This lack of understanding was the result of Andeavor's insufficient internal accounting controls. Andeavor used an abbreviated and informal process to evaluate the materiality of the acquisition discussions that did not allow for a proper analysis of the probability that Andeavor would be acquired. Andeavor's informal process did not require conferring with persons reasonably likely to have potentially material information regarding significant corporate developments prior to approval of share repurchases. As a result, for example, despite Andeavor's CEO's leadership role at the company and the fact that he was the primary negotiator with Marathon, no one involved in Andeavor's process discussed with him the prospects that Andeavor and Marathon would agree to a deal. Because they did not do so, the company failed to appreciate that the probability of Andeavor's acquisition by Marathon was sufficiently high at that time as to be material to investors.² In short, Andeavor did not have internal accounting controls that provided reasonable assurance that its buyback would be executed in accordance with its Board's authorization.

² It is well established that an acquisition need not be more-likely-than-not to occur for it to be material. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 238-39 (1988) (quoting *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 47-48 (2d Cir. 1976)) ("Since a merger in which it is bought out is the most important event that can occur in a small corporation's life, to wit, its death, we think that inside information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions – and this even though the mortality rate of mergers in such formative stages is doubtless high.").

E. Andeavor and Marathon Continue Deal Discussions During the Buyback

22. On February 23, Andeavor's CEO and Marathon's CEO resumed their discussions in-person. This was the day Andeavor entered into the Rule 10b5-1 trading plan the legal department approved that committed the company to repurchase \$250 million of its stock.

23. Between February 23 and March 28, Andeavor bought its stock in the open market at prices ranging from about \$90 to \$103 per share. As it did so, Andeavor and Marathon were discussing a deal that valued Andeavor at substantially higher amounts. About six weeks after executing the Rule 10b5-1 plan, and two weeks after completing the buyback, the two companies' CEOs reached an agreement in principle for Marathon to acquire Andeavor. On April 30, 2018, Andeavor publicly announced that it would be acquired by Marathon in a deal that valued the company at over \$150 per share.

24. As a result of the conduct described above, Andeavor violated Exchange Act Section 13(b)(2)(B), which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are executed in accordance with management's general or specific authorizations, and access to assets is permitted only in accordance with management's general or specific authorization.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Andeavor LLC cease and desist from committing or causing any violations and any future violations of Exchange Act Section 13(b)(2)(B).

B. Andeavor LLC shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$20,000,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

- (1) Respondent Andeavor LLC may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent Andeavor LLC may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

- (3) Respondent Andeavor LLC may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Andeavor LLC as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Melissa R. Hodgman, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

C. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the penalty referenced in paragraph B above. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent Andeavor LLC's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent Andeavor LLC by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary