

## Can Abbott kill the Alere deal?



[Elizabeth Cairns](#)

At this point Alere has a choice between two kinds of near-oblivion. Either it is absorbed into Abbott, becoming part of the Illinois giant's diagnostics division, or Abbott succeeds in breaking the merger agreement, leaving Alere to cope with its woes alone – and its woes are such that if it remains independent it will be a shadow of its former self.

Abbott would contentedly leave Alere to its fate. It is suing in an attempt to terminate the merger, stating that Alere is not the company it was in February when the deal was agreed. And a look back at the series of fiascos that have engulfed Alere this year shows just how strong Abbott's case is (see table below).

### **Return of the Mac**

Abbott's case rests on proving that a "material adverse change" in Alere's long-term prospects has occurred. These so-called Mac clauses were invoked to call off several mergers during the recession, including the acquisition of US student loans company Sallie Mae by a group including Bank of America and JPMorgan Chase; the banks cited the College Cost Reduction and Access Act of 2007 and the drying up of easy credit following the 2007 subprime mortgage crisis as the events that altered the outlook for Sallie Mae.

So what events can Abbott point to as causing Macs to Alere's prospects? A decent lawyer ought to be able to build a case based on a combination of: Alere's failure to file its 2015 annual report on time; a criminal subpoena under the US Foreign Corrupt Practices Act; the permanent withdrawal of an allegedly inaccurate blood coagulation test; another criminal subpoena concerning Medicare fraud; and a separate case of alleged Medicare fraud that led to coverage of its diabetes products being revoked.

And all that inside nine months.

Even so, Abbott will not find it straightforward to walk away from this deal. A less willing acquirer might simply agree a break fee with Abbott, pocket the cash and go about its business, but Alere has clearly concluded that the best outcome it can hope for is for the acquisition to close.

### **Last Chancery**

Indeed, the same court that will hear Abbott's case for termination of the transaction is already playing host to a suit brought by Alere against Abbott with the aim of compelling it to close the deal. Alere is going to fight this all the way, even to the extent of undergoing a court case that will surely highlight a litany of its disasters.

And it might succeed. Pulling its INRatio and INRatio 2 anticoagulant monitoring systems in July is expected to cost Alere \$90m this year and the loss of Medicare coverage of its Arriva business might lose it even more.

But those figures, even added to the other alarming events of the last nine months, might not add up to a Mac. The question will be decided by the Delaware Chancery Court. And here, as with the other obvious question – what on earth Abbott was thinking when it decided to buy Alere – there are no clear answers.

## Abbott and Alere 2016: timeline of a bad deal

Date	Event	Source
February 1	Abbott agrees to buy Alere for \$5.8bn	<a href="#">EP Vantage</a>
March 15	Alere misses the filing deadline for its 2015 annual report, stating that it had to analyse aspects of the timing of revenue recognition in Africa and China for 2013, 2014 and 2015	<a href="#">SEC filing</a>
March 15	It also receives a grand jury subpoena from the US Department of Justice seeking documents relating to its sales practices in Africa, Asia and Latin America, and matters associated with the US Foreign Corrupt Practices Act	<a href="#">SEC filing</a>
March 16	Alere receives a notice of delisting of its stock from the New York Stock Exchange	<a href="#">SEC filing</a>
March 18	Alere defends its anticoagulation monitoring technology after the New York Times publishes an article suggesting it is inaccurate	<a href="#">New York Times</a>
April 28	Abbott offers Alere \$50m to call off the merger. Alere refuses	<a href="#">EP Vantage</a>
July 11	After discussions with the FDA, Alere pulls its anticoagulation monitoring technology from sale	<a href="#">SEC filing</a>
July 27	Alere receives a US Department of Justice subpoena seeking records related to Medicare, Medicaid and Tricare billings dating back to 2010 for patient samples tested at the company's pain management laboratory	<a href="#">Wall Street Journal</a>
August 8	Alere files its 2015 annual report, five months late	<a href="#">SEC filing</a>
August 26	Alere sues Abbott in the Delaware Chancery Court to compel the completion of the takeover, claiming Abbott deliberately failed to get US antitrust clearance	<a href="#">SEC filing</a>
October 12	The US government notifies Alere's diabetes unit, Arriva, that its Medicare enrolment would be revoked as it had submitted claims for 211 dead patients.	<a href="#">SEC filing</a>
October 21	Alere's shareholders approve merger with Abbott	<a href="#">SEC filing</a>
November 3	Abbott files a complaint against Alere in the Delaware Chancery Court alleging breach of contract due to the refusal to provide certain documents under the merger agreement	<a href="#">EP Vantage</a>
December 7	Abbott files a complaint to terminate its acquisition of Alere based on the substantial loss in Alere's value following the merger agreement	<a href="#">Abbott</a>

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