Early Stage Deal Considerations

26th TULANE CORPORATE LAW INSTITUTE
MARCH 28, 2014
Overview

- Conflict Issues
- The Transaction Process
- Special Committees
- Best Practices Considerations
Overview

(Continued)

Possible Conflicts Creating Biases For or Against a Sale

- Board Conflicts
- Advisor Conflicts
- Management Conflicts
- Controlling Shareholder Conflicts
- Conflict Issues Created by Different Classes of Stock
Identifying Conflicts

- What is the most effective way for a board to ferret out potential conflicts, and what are some of the most common conflicts we see?

- Should the board send questionnaires to management and advisors in an effort to elicit potential conflicts?

- Can some of these issues be dealt with in the disclaimer language of an engagement letter?
Banker Conflicts

As it relates to potential banker conflicts, a lot of these situations are obviously highly facts and circumstances driven. In the real world, lawyers for boards and banks seem to be working well to discover potential conflicts, and the banks are being quite forthcoming, subject to their confidentiality and wall requirements.

But in light of all of the potential conflict-related issues, what are the counter-balances that people take into consideration when hiring a full service investment bank?
Banker Conflicts

- Can the retention of a second banker cleanse the taint of the principal banker’s conflict?
- What issues do courts see with that approach and is the timing of the second banker’s retention important?
Conflicts Created by Different Classes of Stock

- In situations involving different classes of stock, how does the board best demonstrate to the court that it fairly allocated the consideration across classes?

- Is it best to implement special procedural protections (e.g., special committee)?
The Transaction Process

Does it make sense to have a team of advisors in place that you call upon in the event of an unsolicited approach or a transaction opportunity generally to build chemistry and trust and avoid having to potentially scramble to assemble a team?
Because courts look very unfavorably on boards that effectively abdicate their leadership and supervisory roles, how do you best educate a board up front about the importance of striking the right balance between running the transaction process and delegating to management and advisors certain functions?

Is frequency of board meetings a good indicator of due care?
The Transaction Process

- Is it permissible for a board to forgo a class of potential buyers (e.g., strategics) or a market-check completely?
  - What are the issues implicated in doing so?
  - What are the best practices involved in doing so?
  - What about a one-off deal?
The Transaction Process

What is the proper scope and timing of minute taking to record board actions and deliberations? Is more more now?
In the sale process, what steps can the board take to ensure a level playing field for both bidders and classes of bidders?
The Transaction Process

- In a sale process, particularly where private equity bidders are involved, should the board institute “chaperoning” policies for management in their interactions with potential buyers (e.g., management presentations/dinners, etc.)?

- When can target management engage in discussions with a bidder regarding post-consummation employment and related compensation arrangements?

- Rules of the Road?
The Transaction Process

- What role should a board play in stress-testing management projections?
- Should projections be kept in the ordinary course of a corporation’s business and be reviewed with the board periodically?
- What issues arise with the updating of projections mid-process?
- Is the expertise of the management team/track record of achieving past projections important to the analysis?
The Transaction Process

Is it necessary for the board to receive valuation materials early in the process?

Must those materials be updated and presented to the board throughout the process?
The Transaction Process (Continued)

- Can a board agree to “Don’t ask; Don’t waive” provisions in confidentiality agreements with potential bidders? Can a board agree to enforce such provisions in merger agreements?

- If so, are timing considerations relevant?
Board Composition

- Does it make sense to evaluate on a sunny day/month board composition to ensure that the board is sophisticated, experienced and energetic enough to endure a potentially long and involved process?

- What sort of witness would a board member make?
Special Committees

- In the special committee context, how do you best fully vet the independence and disinterestedness of special committee members?
  - Does NYSE independence suffice?

- When does a conflict arise to a level of materiality?
Special Committees

- How do you determine whether or not to form a special committee?
- Are transaction committees helpful?
- What are some best practices in their implementation?
- What makes a special committee an effective cleansing or burden-shifting mechanism?
- How broad must a mandate be?
Procedural Safeguards

- Is timing important in terms of the implementation of procedural safeguards (e.g., special committees/majority vote of the disinterested shareholders)?
Best Practices Considerations

- Should the corporation institute a “one-voice” policy and, if so, who should be that one-voice, and how often should the board be reminded of the policy?

- Should the board also institute a policy requiring the CEO and other board members to report any inbound interest?
Best Practices Considerations

- Should the board be reminded periodically of the pitfalls and perpetual nature of “unhelpful” electronic correspondence?

- What about note-taking?