



## MERGERS & ACQUISITIONS IN THE BOARDROOM

### TOP TAKEAWAYS

1. Global recession, distressed business environment and reduction in credit availability significantly limited M&A transactions in 2008, and deal volume is expected to remain at depressed levels through 2009 as the economic environment remains challenging.
2. Debt financing for M&A transactions is not only more difficult to obtain in the current environment, but is typically being subject to tighter financial covenants, higher prices and fees and greater equity contributions.
3. Banks are taking the opportunity in connection with acquisition financing to revisit covenants and pricing in the buyer's existing senior facilities.
4. Be prepared in advance to deal with unsolicited takeover offers, including through a review of the company's basic long term strategy, regular updates on the current takeover environment, and a comprehensive review of the company's structural takeover defenses in light of the current market environment and recent legal developments.
5. Understand your shareholder base and its primary concerns with respect to your company's operations, and monitor trading activity, in order to better anticipate potential unsolicited bids.
6. Typical "Material Adverse Change" clauses have not buyers well when subjected to judicial scrutiny. Be cautious.
7. "Traditional" directors duties can change in the zone of insolvency, and there is increased risk of fraudulent conveyance or constructive fraud claims if consideration is inadequate. Boards need to consider these duties, challenges and ways to mitigate these risks (including through fairness opinions and balance sheets/cash flow projections) if their companies are in this position.
8. Section 363 sales in bankruptcy and Article 9 sales outside of bankruptcy may be appropriate ways to structure distressed M&A transactions – but contingent liability and fraudulent conveyance risk may still be present.
9. Boards' actions in M&A transactions have never been more heavily scrutinized by shareholders and courts. Ensure as a seller that your process is conducted in accordance with fiduciary obligations and by independent advisors and directors. Ensure as a buyer that your acquisition strategy and alternatives, and any potential acquisition target, are thoroughly scrutinized and understood by your board.
10. There are current opportunities for Boards to use M & A as a diversification tool. Well-capitalized strategic buyers, with cash, can use the current environment as a way to address concentration issues in terms of customers, products or geography. Well-diversified and less concentrated companies will have greater enterprise value when the markets rebound.