M&A IN THE BOARDROOM

TOP 10 TAKEAWAYS

1. Board decisions in public and private M&A deals continue to be scrutinized closely by the courts. Recent cases, applying Delaware corporate law, have reaffirmed the business judgment rule, which protects Boards from judicial second-guessing, so long as Board decisions are taken in good faith by disinterested directors exercising their duty of care.

2. Boards' involvement throughout the M&A process--from the initiation of a sales process, selection of advisers, oversight of due diligence, structuring of the transaction, and final authorization of the transaction--must be informed and affected by directors' fiduciary duties of care and loyalty.

3. M&A activity slowed significantly across all sectors of the economy in 2009 but is returning in 2010 as confidence in near-term growth prospects improve.

4. After a very quiet 2009, private equity is not dead. Massive amounts of uninvested private equity capital remain on the sidelines and recent experience in the marketplace suggests sponsors are more willing to compete and accept reduced returns to put money to work.

5. Hostile M&A, as a percentage of total volume, remains relatively active with markets generally supportive of bold moves.

6. Hedge funds are increasingly serving as catalyst investors, heightening Boards' sensitivity to stockholder activism. Increased hedge fund activity as activist/hostile investors is resulting from (i) ready access to large amounts of capital by hedge funds, (ii) a willingness to use "wolf pack" tactics by hedge funds working together, (iii) changing attitudes concerning and greater acceptance of hostile M&A activity, and (iv) overall diminished target takeover defenses.

7. Private equity and many privately negotiated deals are increasingly including "go-shop" provisions, allowing the target Board to solicit alternative proposals from other potential buyers for a certain period of time between the signing of the agreement and the closing of the transaction. Key variables impacting the effectiveness of "go-shop" provisions include: (i) the length of "go-shop" period, (ii) the amount of break-up fees, (iii) the scope of the pre-signing market-check, (iv) the extent of matching rights, and (v) enforcement of other bidders' standstill agreements.

8. Material Adverse Change (MAC) clauses in acquisition agreements have recently increased as an important deal dynamic; however, successfully litigating a MAC by any party attempting to not close a transaction is very difficult.

9. Boards of buyers need to focus on factors critical to ensuring the post-closing success of acquisitions, including (i) strategic and cultural fit (are we selecting the appropriate target for our organization?), (ii) business metrics (are we structuring the transaction properly?), (iii) cost (does the deal make sense financially?), and (iv) planning (how do we proceed after the deal?).

10. As businesses became increasingly more risk adverse during the difficult economic times out of which we are emerging, potential buyers were, and largely still remain, very deliberative and careful (and often slower) in connection with the due diligence investigations of potential targets, especially relative to the more robust M&A markets of 2005 – 2007.