TOP TAKEAWAYS

Private Equity Portfolio Company Corporate Governance Best Practices

1. Fiduciary duties are owed to the shareholders of the company as a whole, other than in a "zone of insolvency" situation where the duties shift to the company's creditors. Accordingly, PE Fund Board Members should always think about what "hat" they are wearing before acting. If there is a conflict of interest, the best course of action is to disclose the conflict and withdraw from the vote.

2. Engaging independent directors is one way to mitigate risks associated with dueling fiduciary duties of Private Equity ("PE") Partners that sit on Boards of their portfolio companies. Ensuring independence can be challenging if the independent director is sourced by the PE Fund and relies on successive nominations by the PE Fund.

3. A written Shareholders' Agreement is an effective avenue by which Shareholders can give themselves veto rights on certain important decisions in the event the Board votes in a manner that the Shareholders are not happy with.

4. It is important to maintain formality in the Boardroom. Key factors include: recording meeting minutes, engaging outside counsel to sit in on Board meetings and help if legal questions come up or if the members need to be reminded of fiduciary duty obligations, and establishing committees.

5. The Board should always obtain independent valuations in connection with "burnout rounds" in order to reflect fair price and fair process. Burnout rounds also call ethics into question so the more the Board can do to show that a fair process was implemented, the better the decision will hold up if ever challenged.

6. Board members should foster personal relationships outside of the Boardroom in order to maintain trust, effective communication and cohesion among a group of people with different backgrounds and different interests. This takes ongoing effort to accomplish. The failure to build and maintain strong relationships among the Board members could lead to tensions among the Board during difficult times.

7. A mix of industry expertise on the Board as well as those less experienced in the industry can foster uninhibited discussions and fresh ideas. With a lack of history about the portfolio company, PE partners can really focus in on the issues and are not afraid to set bold targets.

8. Recent case law suggests that where the PE Fund controlled and/or directed the portfolio company's operational decisions, the PE Fund could be deemed an "operator" and could be on the hook for successor liability claims relating to taxes, employment claims and otherwise.

9. Representations and Warranties Insurance Policies are becoming very popular in the overall structuring of mergers and acquisitions. With various exceptions, these policies help mitigate the buyer's exposure for potential post-closing claims while relieving the seller from being required to set aside significant funds in indemnification escrows to offset any such post-closing claims.

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10. Obtaining Directors and Officers Liability Insurance at closing or immediately following an acquisition is very important to protect the company and its directors and officers from claims by shareholders and third parties arising from acts or omissions of directors and officers. There are certain exclusions, which prevent recovery for insured against insured claims but PE Funds could look to outside director liability insurance as a backstop.

For more information

For more information on Private Equity Portfolio Company Corporate Governance, please feel free to contact the moderator directly:

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