

ANOTHER BENEFIT TO A THOUGHTFUL SALE PROCESS?

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As a result of decisions such as *In re: Appraisal of Dell Inc.*, the once sleepy topic of appraisal rights under Section 262 of the Delaware General Corporation Law has become an area of significant focus in public company acquisition transactions. In *Dell*, Vice Chancellor Laster of the Delaware Court of Chancery held that the fair value of Dell stock was 28% higher than that implied by the deal price in a management-led buyout transaction involving founder, Michael Dell and financial sponsor, Silver Lake Partners. More recently, in another Delaware Court of Chancery appraisal decision, Vice Chancellor Laster held that in certain circumstances, and notwithstanding *Dell*, the agreed deal price should be afforded “substantial evidentiary weight” as an “indicator of fair value” in appraisal proceedings. Specifically, in giving weight to the deal price in the appraisal proceeding, Vice Chancellor Laster focused on the robust nature of the sale process run by the target, enumerating the following factors:

1. Meaningful competition at an early stage of the process and the early inclusion of both strategic and financial bidders in the process;
2. All bidders being afforded access to adequate and reliable information concerning the target, with no bidder or class of bidders being afforded informational advantages; and
3. The absence of any explicit or implicit collusion, either among bidders or by the target or its management with any bidder or class of bidders (i.e., financial sponsors that would retain the management team as was the case in *Dell*).

While the more recent Delaware decision is certainly an important addition to a growing body of case law relating to appraisal proceedings, it is also a timely reminder of the importance of both conducting a robust and thoughtful process when engaging in sale transactions, and being thoroughly prepared before an unsolicited acquisition proposal is received. In that case, the target had been the subject of numerous unsolicited proposals previously, and as such, had a well-established deal team (including external financial advisors and legal counsel) in place when the proposals that ultimately led to the completed transaction came in. In addition, the target had robust projections that had been reviewed by sophisticated external consultants. The target also had a thorough understanding of which directors and officers had conflicts with certain potential acquirers. These facts allowed the target to react quickly and thoughtfully to the various unsolicited proposals and to develop and execute a thorough sale process that resulted in an attractive deal value for the target and its stockholders, which withstood review on appraisal.

Obviously, not every public company will receive numerous unsolicited proposals or related experiential benefits. Nonetheless, every public company can and should take the time to regularly review its plan for reacting should an unsolicited proposal be received. A takeover response plan should include:

- Identifying internal and external deal teams, including financial advisor and legal counsel who are familiar with the company, its management and its competitors, and who should make periodic presentations to the board to familiarize the board with the takeover process and the company’s advisors;
- A thorough understanding of the company’s takeover defenses, including charter and bylaw provisions and the mechanics of adopting a shareholder rights plan;
- Identifying all parties with whom directors and officers have, or have had, significant relationships so as to be able to quickly address potential conflicts of interest;
- Maintaining up-to-date financial projections;

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- Monitoring and understanding the company's stockholder base and having points of contact with large stockholders, as well as a relationship with a proxy solicitation firm; and
- Establishing a clear public relations plan, including both a "no comment" policy on market rumors, as well as an identified team, including a financial public relations firm, to make any announcements that may become necessary.

A public company that is well prepared for an unsolicited proposal, and for M&A generally, is much more likely to successfully address such a proposal, irrespective of whether the proposal ultimately results in a transaction or not. Successful execution via a thoughtful sale process should result in a greater stockholder value, full compliance with fiduciary duties (and avoidance of claims for breach) and possibly avoiding negative results in an appraisal proceeding.

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