

**The Legal Department's
Role in Due Diligence,
Managing Risk and
Getting the Deal Done**

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Preparation and First Steps — Assembling the Transaction Team

- **Retain highly-qualified legal and financial advisors**
- **Other members of the team include:**
 - Business personnel
 - Internal legal
 - Accountants
 - Other specialists depending on the nature of the transaction
- **Vet any potential conflicts of interest early in the process**
 - Be mindful of relationships between bankers, lead director or the CEO with the counterparties
 - Potential sources of banker conflicts include providing services to the counterparty in relation to the transaction (e.g., staple financing)
 - GC to work with outside counsel to ensure that directors and management are aware areas of potential banker conflicts and that bankers are instructed of their role throughout the transaction

Preparation and First Steps — General Considerations in Coordinating the Team

- **Ensure that management and other business personnel have been instructed on how to interact with the other side**
- **Have a clear message and ensure that the team does not stray from that message or send mixed messages**
- **Establish a timetable for the transaction**
- **Limit the number of people with knowledge of the transaction to reduce the risk of leaks**

Preparation and First Steps — Legal Issues Early in the Process

- **GC to work with outside legal counsel, financial advisors and tax advisors to help guide the business team in selecting the optimal transaction structure (e.g., merger, stock purchase, asset purchase, etc.)**
- **Identify any key transaction issues that may be identified in due diligence, including collecting and reviewing publicly available information on the target and its operations**
- **Ensure key transaction terms are identified**
- **Identify regulatory issues such as antitrust**
- **Identify fiduciary duty issues for both sides**
- **Identify any negative information that may need to be shared with the counterparty**

Preparation and First Steps — Role of the GC

- **Coordinating and scheduling meetings with the board**
- **Review of fiduciary duties**
- **Transaction updates**
- **Coordinating with the business team**
- **Difference in roles for a large company GC v. small company GC**

Preparation and First Steps — Fiduciary Duties

- **Business judgment rule** — courts won't second guess director decisions if there is a rational business purpose, and the directors comply with the duty of loyalty, duty of care and duty of good faith
- **Revlon duties** — responsibility to maximize value under certain circumstances
- **Unocal duties** — enhanced scrutiny for review of deal lock-ups
- **Decisions must be made for the benefit of the stockholders taken as a whole; the largest stockholder cannot dictate the terms of the transaction**

Preparation and First Steps — Good Process

- **Board should meet periodically during the process**
- **Appropriate advice from outside advisors**
- **Includes advice on value and fiduciary duties throughout the process**

Preparation and First Steps — Maintaining a Good Record

- **Treat each document as if it is going to be read by a plaintiff's lawyer, including causal correspondences and incomplete notes of meetings or conversations**
- **Documents accurately and clearly reflect the events that took place**

Preparation and First Steps — Coordinating Due Diligence

- **GC to work with outside counsel to determine the scope and depth of due diligence with an eye towards balancing factors such as time, competition, cost and risk management**
- **Preparing the due diligence request list**
- **Coordination among the groups performing due diligence is important, so that key issues are brought to the attention of the appropriate people as soon as possible**
- **Effects of transaction on contracts and permits currently in place:**
 - Change of control and anti-assignment depending on structure
 - Non-compete

Preparation and First Steps — Coordinating Due Diligence

- **Review pending and threatened litigation**
- **Regulatory issues**
 - Evaluating risk mitigation process of the target (e.g., FCPA, internal controls and compliance controls)
- **Potential liabilities including:**
 - Environmental liabilities
 - Indemnification obligations
- **Effects of the potential transaction on existing benefit plans, employment agreements, and pension and retiree health obligations**

Transaction Terms

- **GC to work with outside counsel to guide the business team in determining appropriate deal terms and protections and negotiating such provisions**
- **Ensuring a good process for making decisions on substantive deal terms**
 - Define the roles of the in-house legal team and outside counsel
 - Determine how much latitude is given to outside counsel in making decisions

Regulatory and Litigation Issues — Antitrust

- **Determine if a filing is required**
- **4(c) documents are required to be filed, among others**
- **Documents produced by or for officers or directors for the purpose of evaluating the transaction with respect to market shares, competition, competitors and other competition related factors**
 - “Documents” is interpreted broadly by the FTC and DOJ and would include items such as handwritten notes, memos, e-mails and other correspondences
- **Gun-jumping**
 - Parties to a transaction remain competitors in the interim period from signing to closing
 - Concerns for exchanging information that may be competitively sensitive
 - Acquiring party should not try to direct the business activities of the target until the transaction closes
- **Establish roles for in-house counsel and outside counsel and coordination of process in connection with a second request**

Regulatory and Litigation Issues — Risk of Litigation

- **Expect a suit to be filed upon announcement of the transaction for claims such as breach of fiduciary duties and failure to disclose**
- **94% of transactions over \$100 million resulted in litigation in 2013**
 - For the fourth consecutive year, shareholder suits were filed in more than 90% of M&A deals valued over \$100 million

Special Considerations in Cross-Border Transactions — U.S. and Foreign Government Concerns

Actual and potential concerns of U.S. and the relevant foreign governmental authorities should be carefully considered and addressed as early as possible in the deal process (and in any event, before the deal is announced)

Special Considerations in Cross-Border Transactions — Due Diligence

- **Need to retain highly-qualified local counsel**
- **Take into account cultural differences in conducting diligence / making due diligence requests**
- **Special focus on foreign target's compliance/future ability to comply with FCPA, U.S. sanctions laws, and U.S. export laws by foreign targets**
- **Special focus on employment and labor law issues, as many jurisdictions have strict restrictions on the ability to fire employees and complex hourly wage, working hours, and benefits requirements**

Special Considerations in Cross-Border Transactions — Other Issues

- **Understanding the differences in accounting rules and standards and tax implications**
- **Post-closing integration needs to be planned as early as possible (with due regard to the U.S. and foreign anti-trust and anti-competition sensitivities)**

Speaker Biographies



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David E. Rosewater is a partner with Schulte Roth & Zabel, where his practice focuses on mergers & acquisitions, private equity/leveraged buyouts, distressed investments and acquisitions, and shareholder activism. He has represented numerous corporate and private equity buyers and sellers, including in connection with the acquisition of AT&T's Yellow Pages - Advertising Solutions and AT&T Interactive Businesses, a transaction named the 2012 "North America Large Private Equity Deal of the Year" by Global M&A Network and the "M&A Deal of the Year (over \$500 million)" by *The M&A Advisor* and the New York Chapter of the Association for Corporate Growth. He assisted on the acquisition of Caritas Christi Health Care System, which was named the "North America Private Equity Deal of the Year" by Global M&A Network as well as the 2010 "Deal of the Year" in the health care category by *Investment Dealers' Digest* magazine. David has represented clients in connection with leveraged buyout transactions of Austrian bank BAWAG, integrated logistics systems services provider Syncreon, Exco Resources, GMAC, and certain Newell Rubbermaid divisions, among others. As co-head of the firm's global Shareholder Activism Group, he has also represented companies and shareholders in connection with a number of major shareholder activism campaigns, including those involving The New York Times Co., The Wet Seal Inc., BRE Properties, Stillwater Mining Company, SandRidge Energy Inc., PHH Corporation, CNET Networks, CSX Corp., Red Robin Gourmet Burgers Inc. and Mentor Graphics Inc. He was recognized as a 2014 "Dealmaker of the Year" by *The American Lawyer* for his work on high-profile shareholder activism campaigns and proxy contests.

Speaker Biographies



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Michael E. Swartz is a partner with Schulte Roth & Zabel, where he focuses on complex commercial, securities and business litigation and antitrust law, particularly as it relates to mergers and acquisitions. His litigation practice includes proxy contests and other corporate-control disputes, such as the representation of Cerberus Capital Management in shareholder class actions challenging Albertsons' acquisition of Safeway; Marlin Equity Partners in shareholder class actions challenging its acquisition of Tellabs; Aeroflex and its board of directors in shareholder class actions challenging Cobham's acquisition of Aeroflex; TPG-Axon in its successful activist campaign against SandRidge Energy and The Children's Investment Fund in its proxy contest with CSX Corp.; Equal Energy, Ltd. in an expedited action against a dissident shareholder group; Morton's Restaurant Group and its board of directors in class actions challenging Tilman Fertitta's tender offer for all the outstanding shares of Morton's; the board of directors of Charming Shoppes in derivative and class actions challenging Ascena's \$890-million tender offer for all the outstanding shares of Charming's common stock; and Chrysler LLC in connection with its strategic alliance with Fiat SpA. Michael also focuses on class actions, professional liability, and international litigation and arbitration, and he represents clients before the Department of Justice, the Federal Trade Commission, and States Attorneys General, as well as other antitrust regulatory agencies, in connection with mergers, acquisitions and joint ventures. His antitrust practice involves the representation of companies across a wide range of industries, including private equity firms, financial services firms, rating agencies, defense industry companies, payment card companies, auto manufacturers, car rental companies and supermarkets, among others.