M&A STRATEGIES FOR SUCCESS

Michael Gilligan and William Gussman Jr., both partners with Schulte Roth & Zabel, share guidance for boards to help ensure a successful M&A strategy.

There's been a lot of activity in the M&A arena. At the beginning of the process, one of the biggest challenges is putting together the deal team. What are the best strategies for success?

Michael Gilligan: I think the preparation starts even before the process begins. It's always a matter of being prepared. Expect deals to happen regularly. Have an established practice with respect to how deals work. Have the relationships with advisers lined up. Have a clear view as to what's going to happen. Bring outside advisers in relatively early so you can make sure you don't make mistakes that can't be corrected.

With regard to the size of the deal team, I think it evolves over the course of the transaction. At the early stages, the deal team is more likely to be small and focused on high-level issues—whether a deal makes strategic sense, pricing issues, and so forth. But as the deal becomes closer to getting signed and a definitive agreement gets closer to being executed, invariably that team expands. Then it's important to make sure that it expands in a reasonable way, that the right knowledge specialty areas are added in the right places, and that everybody knows what to expect. Mistakes can happen when people are surprised, or when there's a lack of advanced planning. While it's a case-by-case situation that varies from deal to deal, having a clear game plan at the outset is key to ensuring you don't make mistakes.

In addition, you may not want too many people on the deal team because it's a distraction for the business.

Gilligan: Exactly. As M&A professionals, we sometimes forget that the people executing the deals have day jobs. Most of them have companies to run, and it's important to keep that in mind. Any company that is going to be active in the M&A space needs to have a game plan as to how the process is going to work, who's going to be responsible, who's going to be brought in and at what times. If you plan ahead, as with most things in life, you will be more successful than if you improvise.

What is the appropriate role of the board of directors?

William Gussman: The board needs to be actively involved. This is not just good advice; this is the law. In a sale process, the board may have "Revlon duties," and directors need to maximize value in a transaction. To avoid liability, directors should be involved early and often.
The board should be included from the earliest stages, including the vetting of the financial adviser on the deal. Directors have a responsibility to be informed as part of their duty of care, so they should be involved from the very first steps.
The board should meet frequently during the sales process. A big mistake I see in M&A shareholder litigation is a lack of evidence that the board was meeting and meticulously looking at the transaction every step of the way. It's important that directors are not just involved early, but that they are meeting to discuss the transaction, that these meetings are documented, and that they're actively participating from beginning to end.

From a board of directors standpoint, what are some of the questions they should be asking management?

Gilligan: That's going to change from deal to deal. The hot-button due diligence issues will vary by industry. It's going to depend on the geographic scope of the target's operations. It's going to depend on the nature of the company's operations. There should be a clear list of priority items, and those should be addressed in a focused fashion so that the issues with longer lead times get addressed early. Again, it's about planning. Some diligence items can be addressed quickly; others cannot. The issues that take more time to dig into are addressed early in the process so that you don't end up having the train cars out of order. You can end up with a situation where everything is ready to go except there's one long lead time diligence item that hasn't yet been dealt with. That situation can put pressure on people to ignore the diligence item that hasn't been done just because everything else is ready. It's also important to know the items that are going to be most difficult to investigate, and whether you have a target that's involved in government contracting with operations around the world. If so, the Foreign Corrupt Practices Act, the UK Bribery Act, and other anticorruption statutes are fundamental items you need to address, and you can't investigate those items quickly.

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What triggers shareholder litigation?

Gussman: It used to get triggered by virtue of doing a deal; it used to be automatic. That's not the case anymore. There are many reasons why it is no longer a given. A couple of decisions in Delaware have made it more difficult for plaintiffs to bring these cases, and these decisions have encouraged settlements on a disclosure-only basis right away. This environment has raised challenges for both sides of the bar, but it has brought the number of litigations down, which raises the question: How can you avoid them? There's no silver bullet to avoiding shareholder litigation, though to a certain extent, size really does matter. Bigger deals are much more likely to be a subject of litigation, just because the stakes are higher, and it's more enticing for plaintiffs' lawyers. However, there are some things you can do.

Most important, focus on your disclosures. That is one thing M&A lawyers and other professionals have really worked on. If you have rigorous disclosures and have been very careful about that, you will fare much better. The plaintiffs' lawyers in these cases are looking for obvious weaknesses and holes in the disclosures, so that's very important. Second, in regard to your financial advisers, make sure there are no conflicts. There have been situations in recent years where there have been vulnerabilities and some parties have suffered the consequences in litigation when the financial adviser wasn't fully vetted and failed to disclose certain conflicts, including, for example, working on the buy side, believe it or not, in terms of arranging financing. Personal relationships that could lead to conflicts also really need to be vetted because plaintiffs' lawyers could get wind of that early on, and that could be a centerpiece of litigation. The third thing is to make sure the company has a forum selection bylaw specifying that any internal corporate disputes are to be litigated in its home state. Delaware specifically permits this kind of provision, and it can prevent deal-related litigation from being spread out all over the country. Obviously, this is something companies should do before becoming involved in any sale process.

Gilligan: In addition, expect that everything you write down, every piece of advice you give, every decision you make is going to be subject to second-guessing, so make certain your documents are internally consistent and accurately reflect the amount of work, thinking, and analysis that the board, company, and advisers did with respect to the transaction. It's better to expect a suit, and know that whatever you write down is going to be discoverable at some point.

Gussman: It absolutely will, and in these cases, it will be discoverable very early. There will be discovery from the board and from financial advisers, and you need to be prepared to make sure that the record is as good as it can be.

What are the key risks for directors?

Gilligan: Being underprepared. There are many high-quality advisers out there who are more than happy to give free advice to boards and companies, to educate and to help. If you're prepared, if the M&A process becomes part of a company's tool kit of operations, then it's an operational area for companies. If you have a plan, if you have professionals lined up, if you take advantage of all the learning opportunities that are available, the process should go pretty well. Yes, there are going to be some situations where people need to make very tough calls on risks that are hard to quantify or may even be unknown, but when those come around, you can address them if you have sophisticated advisers and a good internal team.

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