M&A: What You Need to Know Now 2009

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We recently attended PLI's San Francisco seminar regarding the M&A landscape in 2009. Co-chaired by R. Scott Falk (Kirkland & Ellis) and Sarkis Jebejian (Cravath, Swaine & Moore LLP), the seminar featured a range of perspectives on what has been a tumultuous time for M&A transactions.

PLI provided valuable materials to the seminar's attendees, including a bound volume containing articles and summaries of different M&A topics. For M&A practitioners who are unable to attend or review the video of the seminar, this book serves as a valuable primer on what you need to know about mergers and acquisitions in 2009.

Big Picture

Day one commenced with an overview of the current M&A market environment. This overview was hosted by the co-chairs (Falk and Jebejian), Jason DiLulio (Credit Suisse Securities) and James C. Katzman (Goldman Sachs). The moderators explained that, like the rest of the financial markets, M&A transactions stalled substantially in the latter part of 2008 and early 2009. As 2009 progressed, however, the volume of M&A transactions increased.

In fact, 2009 is expected to yield a volume of M&A transactions similar to 2004. Sure, that reflects a significantly lower volume than the bubbles of 2006 and 2007, but it's not as low as 2002's Death Valley. Besides, 2009 has already seen some interesting trends.

Leverage buyouts have virtually disappeared, with lending of all sorts switched off like a spigot. There's also been a decline in hostile transactions. Cash/stock combinations (approximately 84 percent of the M&A transactions for 2009) are far more prevalent than in years past.

Money matters, and 2009 created many opportunities for well-capitalized parties, who have the easiest time obtaining financing. More risky investors have difficulty obtaining financing, which has reduced the volume of M&A transactions. Similarly, banks are now financing fewer transactions than in years past, and those transactions generally take longer because the parties engage in more due diligence.

Still, everyone seemed to agree that the M&A landscape has become more stable than it was in the latter part of 2008. Hopefully this bodes well for an uptick in M&A transactions soon. You may want to set your crying towels aside, but you may not want to throw them away just yet.

Surviving the Regulatory Environment

Later that same day, a panel provided their views on the current regulatory environment. The panel included the co-chairs (Falk and Jebejian), Patricia Brink (Deputy Director of Operations, Antitrust Division of the U.S. Department of Justice), Janet L. McDavid (Hogan & Hartson) and Richard G. Parker (O'Melveny & Myers). The panel educated the audience about the procedure of regulatory investigations, offering tips to plan for (and withstand) costly and burdensome investigations.

Ms. Brink gave the government's assessment of recent M&A activity. This year has seen fewer regulatory filings. Yet of those filings, there was a greater percentage of government challenges, perhaps due to a greater number of strategic filings.

Ms. McDavid and Mr. Parker focused on the client side of governmental investigations into M&A transactions. Their overarching suggestion was to tread carefully. Government investigations can be the death knell of a potential deal. Smart clients engage counsel early to assess antitrust risks, give advice and examine potential remedies and alternatives.

A government investigation in this area is akin to the worst document subpoena imaginable (one merger investigation involved 25 million pages of responsive documents). Plus, a government investigation will cause delay, a detriment to both parties. At six to 12 months, the time span of a typical investigation can also cause both sides to incur tremendous costs. These costs flow from document production and hiring support staff. Of course, there is also asset depreciation and devaluation of the seller's business while the deal hangs in limbo. Mr. Parker estimated that an extensive investigation may cost the parties $20 million.

Ms. McDavid and Mr. Parker also offered tips on dealing with clients and the government. Clients want protection, assurances and due diligence from the other side. As a practitioner, when assessing the risks, it's important to advise clients of the procedure (especially about the differing standards of review). The Department of Justice and the Federal Trade Commission each have rules and even peccadilloes. It's also important for practitioners to ensure that in the process of doing due diligence on behalf of the buyer, operational control always remains in the hands of the seller.

Dealing with a governmental agency also requires skill, care and even finesse. As a helpful tip, Mr. Parker clarified that the government's client is the consumer. As such, the government doesn't care who stands to profit on the deal. Its focus is whether the consumer will be worse off. To protect the consumer, the government is willing to engage in a long, drawn-out investigation. For a practitioner dealing with government investigators, credibility has paramount value, as does an attitude that is more humble and forthright than cavalier.

No one looks forward to battling the government on the eve of a deal. However, the panel advised that these tips can provide greater assurances that both parties will get the deal done and emerge unscathed.

SEC Developments in M&A

Day two included a panel discussion providing an overview of SEC developments applicable to M&A. The panel included Michele M. Anderson, the Chief of the Office of Mergers and Acquisitions in the SEC's Division of Corporation Finance. Ms. Anderson gave valuable inside baseball commentary on the SEC's thinking about the latest developments in the M&A field.

Ms. Anderson focused on the latest SEC guidance on Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, first discussing the SEC's enforcement action *In the Matter of Perry Corp.*, Exchange Act Release No. 60351 (July 21, 2009). This SEC proceeding arose out of the involvement of a hedge fund ("Perry") in Mylan Laboratories' proposed acquisition of a target company.

As part of Perry's merger arbitrage, Perry purchased Mylan shares in order to vote the shares in favor of the merger. Perry then engaged in swap transactions related to the Mylan shares. The SEC alleged that Perry failed to file a required disclosure statement pursuant to Section 13(d) within 10 days of acquiring beneficial ownership of more than five percent of Mylan's shares.

The dispositive issue was that Perry's acquisition of Mylan securities was not "in the ordinary course" of its business. That meant it could defer its reporting obligations pursuant to Rule 13d-1(b). Ms. Anderson indicated that where securities are acquired to influence the direction or management of an issuer or to affect or influence a transaction's outcome, such acquisition is not "in the ordinary course" of business for institutional investors.

Indeed, such "empty voting" will be subject to heightened scrutiny. Ms. Anderson stated that the SEC hoped that *Perry Corp.* would help establish objective standards related to Rule 13(d) reporting requirements.

Ms. Anderson also discussed the SEC's "Compliance and Disclosure Interpretations," published on September 14, 2009. These 37 questions and answers provide guidance on Exchange Act Sections 13(d) and 13(g), Regulation 13D-G beneficial ownership reporting, and Schedules 13D and 13G. According to Ms. Anderson, 14 of these Q&As are the same as interpretations published previously. The other 23 Q&As provide new and valuable guidance.

Ms. Anderson highlighted Question 110.06, which summarizes the SEC's order from *In the Matter of Tracinda Corporation*, Exchange Act Release No. 58451 (Sept. 3, 2008). The SEC found that Tracinda (wholly owned by famous octogenarian Kirk Kerkorian) had made a material omission violating Section 13(d)(2) of the Exchange Act and Rule 13d-2(a). Tracinda *intended* to sell 28 million shares of GM stock, but was only able to sell 14 million shares because of an unexpected deep discount in the price offered.

Amending its Schedule 13D, Tracinda reported the sale of 14 million shares. However, it did not disclose its plan to sell the 28 million shares. This omission violated Item 4(a) of Schedule 13D. Thus, the Q&A provides that generic disclosure reserving the right to engage in any of the kinds of transactions enumerated in Item 4(a)–(j) of Schedule 13D must be amended when the security holder has formulated a *specific intention* with respect to a disclosable matter.

While the panelists discussed many other topics, these words from the proverbial "horse's mouth" were the most enlightening. PLI's *Mergers & Acquisitions: What You Need to Know Now 2009* is worth attending, especially for those wanting an update on trends, securities and government issues that go beyond the tax field. Details are available at *www.pli.edu/product/dvd_detail.asp?id=48711.*