KIRKLAND & ELLIS LLP

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Custom (Go-)Shopping

Deal protections terms should not be viewed as a straight-jacket that dictates inflexible boundaries. Instead, there is room for creativity to tailor market terms to the real-world circumstances of a particular transaction, which is precisely what courts expect boards and their advisors to do.

The Delaware courts have often repeated the bedrock principle that there is no one path or blueprint for the board of a target company to fulfill its *Revlon* duties of seeking the highest value reasonably available in a sale transaction. The courts have usually deferred to the judgment of the directors as to whether the requisite market-check is best achieved by a limited pre-signing process, a full-blown pre-signing auction or a post-signing fiduciary out. However, as evidenced in the recent decision by VC Glasscock in *NetSpend*, it is equally true that the courts will also not automatically bless a sale process simply because the deal protection provisions fall within the range of "market" terms. Especially in a single-bidder sale process, the courts will continue to seek evidence of a fully informed and thoughtful approach by the target board to the sale process and deal protection terms with the goal of maximizing value for shareholders.

The innovative go-shop, which first gained popularity during the 2006-2008 LBO boom as an alternative to the traditional no-shop, initially reflected such a nuanced approach to balancing the desire to quickly strike a deal with a single financial buyer with the recognition that a more robust post-signing market check was probably in order. However, it rather quickly fell victim to the precedent-driven marketplace for deal terms — both in its fairly reflexive deployment as "required" in certain deals (mainly private equity go-privates) and in its largely standardized detailed terms. While the introduction of a "hybrid go-shop" (which we wrote about in 2010) reflected a thoughtful adaptation of the go-shop tool in a different category of deals (sales to strategic buyers in single-bidder processes), the traditional go-shop remained fairly regimented, with any variation mostly residing at the edges — e.g., the number of days the target was permitted to actively solicit competing bids or the percentage of the discount on the full break-up fee for topping deals struck with go-shop participants.

However, a number of recent deals have broken this mold with the go-shop being deployed with significant modifications:

- In the recent acquisition of Websense by Vista Equity (soon copied in the Shuanghui/Smithfield deal), the merger agreement includes a traditional no-shop, but with a narrow go-shop-like exception that allows the target to continue discussions and due diligence with a limited number of bidders who were active participants in the sale process before the deal was announced. A lower break-up fee (Websense – 50%; Smithfield – 43%) is payable if the target terminates the initial deal to accept a superior offer from one of these "excluded bidders" by a specified deadline. The relevant period is relatively short (in Websense, a few weeks) and the topping bid has to be completed and signed (rather than just first made) by the deadline in order to qualify for the lower fee, noting that these bidders were well into the bidding process when they lost the pre-signing auction.
- A very different approach was taken in the recent sale of BMC Software to a consortium led by Bain Capital/Golden Gate Capital. While the agreement included, at the target's insistence, a fairly traditional go-shop, the merger agreement provides that certain parties that had participated in the robust and somewhat public auction prior to the announcement of the consortium deal were not eligible for the lower break-up fee payable by go-shop participants who strike a deal on a topping bid before the deadline.

Rather than reflecting random tweaks to the traditional go-shop structure, the seeming discrepancy in outcome between the two approaches instead reflects thoughtful attention to the specific circumstances in each deal. As disclosed in the Websense tender offer documents, the "limited go-shop" construct was proposed by the buyer in the context of an early bid that was made before the final bid deadline that ended an extensive, albeit private, pre-announcement canvass of the market. The narrow go-shop-like exclusion for final round participants could address concerns about the auction being cut short by an advance bid (which the target invited all participants to make) by allowing the Websense board to take the bird-in-hand of the compelling early bid but protecting itself against the possibility (and associated criticism) of leaving a better bid on the table by not playing out the auction to its scheduled conclusion. By contrast, the BMC approach (where the lower fee associated with a go-shop topping bid is not available to pre-signing auction participants) addresses the countervailing concerns of a buyer when a pre-signing auction does in fact reach a conclusion with "best and final" bids, but where the target, perhaps driven by market practice, still insists on a go-shop. In such a case, the buyer can legitimately argue that the go-shop should not be a low-cost open door for losing bidders to have another bite at the apple.

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While the market for deal terms will continue to evolve and precedent-based arguments will persist in negotiations, as we have argued in the past in deal protection "one size does not fit all". The recent high-profile Delaware rulings on "don't ask, don't waive" standstills reflect a similar rejection of a "check the box" mentality — rather than enacting a blanket approval or prohibition, the courts have demanded justification for use of the powerful tool in the particular circumstances as well as a record that the target board truly considered the use and non-waiver of such a standstill. The description of the modified go-shops above, as well as other recent innovations like limited matching rights and management neutrality provisions (see, e.g., recent Dell and Duff & Phelps deals) are not intended to suggest (or catalyze) a dramatic shift in expected terms for deals of this kind. Rather, we are highlighting that "the market" for deal protections terms should not be viewed as a straightjacket that dictates inflexible boundaries. Instead, there is room for creativity to tailor market terms to the real-world circumstances of a particular transaction, which is precisely what courts expect boards and their advisors to do.

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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