

## The Global M&A Boom Continues: Are Boards Getting Shareholders Their Money's Worth?

By *Keith L. Johnson and Cynthia L. Richson*

Mergers and acquisitions are rife with conflicts of interest.<sup>1</sup> In addition to the divergent interests of a target company and acquirer, transactions often involve conflicting motivations between management and shareholders, advisors and clients, independent and inside directors, companies and their various stakeholders, and inside and outside shareholders. Among a company's outside shareholders, there are also likely to be divergent views between short-term and long-term investors. Even within individual institutional investor shareholders, there may be conflicting interests of public and private equity portfolio managers or between hedge fund and long-only portfolio managers.

Moreover, investment banks have been the biggest beneficiaries of the M&A boom with earnings soaring at the five biggest investment banks.<sup>2</sup> Critics of public companies that go private allege that some boards of directors may be accepting deals for reasons other than best-available price and that corporate executives are being enriched at the expense of shareholders. Such criticism has resulted in increased scrutiny of possible conflicts in private equity transactions. Even the Delaware Chancery Court has begun to question the effect that management conflicts of interest have on negotiation and approval of transactions where public companies are being taken private.<sup>3</sup>

Despite these conflicts, mergers play a critical role in the allocation of capital in both the U.S. and Continental Europe.<sup>4</sup> However, with so many players pursuing competing agendas, it can be easy to lose sight of the guiding economic goal that drives merger and acquisition activity—the creation of sustainable corporate value for shareowners. Institutional investors can serve a key role in focusing all of the merger and acquisition players on the pursuit of sustainable corporate value creation.

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*Keith L. Johnson heads the Institutional Investor Consulting Services section at Reinhart Boerner Van Deuren sc and Cynthia L. Richson is the Founder of Richson Consulting Group, llc. Mr. Johnson formerly was Chief Legal Counsel of the State of Wisconsin Investment Board (SWIB) and Ms. Richson formerly was the Corporate Governance Officer for the Ohio Public Employees Retirement System (OPERS).*

Viewing transactions from the perspective of long-term institutional investors, as fiduciaries with an obligation to serve the best interests of their ultimate beneficiaries, can provide a clear path through this jungle of conflicts.

A recent survey of corporate directors found that almost 62 percent agreed with the statement, "On balance, mergers and acquisitions destroy more value than they create."<sup>5</sup> There are numerous examples of mergers that have gone very badly<sup>6</sup> and an aggregate wealth loss of \$240 billion for acquiring firm shareholders from mergers during 1998 to 2001.<sup>7</sup> Institutional investors have been burned and are becoming more skeptical about proposed transactions. With the recent growth in merger and acquisition activity, this skepticism may be healthy.<sup>8</sup>

### Role of Institutional Investors

As a group, institutional investors have an overwhelming financial incentive to promote integrity of the merger and acquisition process and good corporate governance is beneficial to both stockholders and bondholders.<sup>9</sup> They own 59 percent of United States public company stock.<sup>10</sup> Institutional investor ownership of the largest companies is even more concentrated, at 69 percent for the Fortune 1000. Pension funds alone own 28 percent of United States public equities; mutual funds own 20 percent; insurance companies own 9 percent; and banks and foundations both own less than two percent each. In addition, pension fund equity assets tend to be heavily indexed, with over 41 percent invested passively in index funds.<sup>11</sup> Ownership of public companies in the United States tends to be broadly dispersed.

In Canada, public company ownership is more concentrated than in the United States. About 75 percent of companies listed on the Toronto Stock Exchange have a controlling shareholder, which may be a founding family or an institutional investor.<sup>12</sup> Control is often maintained through issuance of dual class stock, with the controlling shareholder owning a substantial block of the voting class.<sup>13</sup>

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Despite these differences, institutional investors play a determinative role in the system for corporate acquisitions in both markets.

The interests of different kinds of institutional investors, however, can vary considerably. Pension funds, particularly large public pension funds, are more heavily indexed and universally invested.<sup>14</sup> This broadly exposes them to market developments over the long term and predisposes pension fund managers to take an interest in market integrity issues and sustainability of corporate performance.

Actively managed mutual fund portfolios, on the other hand, are more likely to trade often, resulting in average portfolio turnover of holdings of less than a year.<sup>15</sup> Accordingly, mutual fund managers often have a shorter-term view, preferring immediate profits over building long-term corporate wealth. Some hedge funds that pursue short-term strategies have similar interests. Investment managers that short stock as part of their investment strategy may even have a vested interest in seeing declining company fortunes.<sup>16</sup>

The impact of these diverging interests was born out in a 2006 study by Lily Qiu at Brown University.<sup>17</sup> She reported that acquirers with large public pension fund shareholders performed relatively better in the long run than other acquirers and had fewer value destroying acquisitions. She also found that mutual fund ownership was positively associated with future merger and acquisition activity, and that acquirers with more mutual fund ownership performed worse in the stock market.<sup>18</sup>

Private equity funds are also having an increased impact on merger and acquisition activity. With larger amounts of institutional investor money being allocated to private equity, the number of companies being taken private in management buyout transactions bankrolled by private equity and hedge funds has mushroomed.<sup>19</sup> One of the results of this “going private” trend has been to move increases in value achieved in corporate turnarounds from public to private market investors.<sup>20</sup> Even for institutional investors that participate in management buyouts through private equity funds, the net effect of transferring gains to private market portfolios may not offset the corresponding losses to the institutional investor’s public portfolios (including combined index fund and passively managed portfolio exposure).<sup>21</sup>

In response, some public market investors have begun to fight back against management buyouts.<sup>22</sup> Shareholders filed a lawsuit in New York City in November 2006 alleging that 13 private equity firms conspired to fix buyout prices by bidding collusively in transactions involving three public companies.<sup>23</sup> A related United States Justice Department investigation is also pending.

## **Institutional Investor Issues in Mergers and Acquisitions**

The varying interests of institutional investors result in different views on issues that arise in merger and acquisition transactions. Understanding these differences between investors presents both challenges and opportunities to other transaction participants. Hot button issues can include the following:

(1) Short-term gains versus sustainable long-term wealth: Although pension funds and most of the investors in mutual funds are investing to meet long term goals, many of the portfolio managers that serve as the stewards of their assets operate with a short-term investment horizon that is driven by competitive pressures. In both the United States and Canada, pension funds control more wealth than any of the other institutional investors. However, many pension fund managers delegate investment responsibility for large chunks of those assets to external investment firms, which are then evaluated on a quarterly basis and paid on assets under management rather than performance over any particular time period. This can result in a disconnect between the long-term interests of underlying investors and the strategies of portfolio managers.

Short-term investors are more likely to support merger and acquisition strategies that emphasize the creation of immediate gains, even at the expense of a company’s future health. However, investors that take a truly long-term view are likely to be more open to considering the impact of a transaction on sustainability of performance and support strategic plans that will build company value over several years. Where there is a tension between the short-term and long-term impact of a transaction, many institutional investors will want to evaluate how it fits with their investment horizon. For example, risks relating to company reputation, future regulatory changes and product obsolescence may be of more

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concern to long-term investors, particularly those with index fund exposure to the company.<sup>24</sup>

Boards have been accorded wide business judgment discretion to determine when a company should pursue long-term strategic business goals over maximization of short-term returns.<sup>25</sup> They can use this discretion to align with long-term investors in pursuing strategic plans to create sustainable corporate wealth. However, when communicating about strategic plans with portfolio staff at institutional investors, companies might need to stress this fundamental alignment of long-term interests between the company and the institutional investor's clients or beneficiaries.

(2) **Alignment of Executive Compensation with Investor Interests:** While change in control payments were originally intended to remove any disincentive for target company executives to oppose a transaction that could cost them their jobs, the payments have become large enough at many companies to create an economic incentive for executives to support a transaction regardless of whether it is in the best interests of shareholders. In addition, where executives will receive other compensation from the acquirer or accelerated vesting of options in connection with the transaction, change in control payments may be unnecessary. At their worst, these payments can add up to huge amounts that appear to be an inappropriate reward for the company's underperformance that lead to the transaction.

In addition, studies have found that the amount of compensation an executive receives is mostly related to size of the company.<sup>26</sup> This creates an incentive for executives of acquiring companies to undertake acquisitions merely to obtain an increased compensation award—a disastrous combination for shareholders when combined with the poor track record for acquisitions.

Management buyouts can also present the opportunity for misalignment in payments to executives. Private equity firms can often offer the executives added bonuses and options in the new company, which may not be publicly reported until long after the transaction has been completed, if ever.<sup>27</sup> The use of substantial private payments to a company's executives in a going-private transaction raises questions about whether the executives were essentially "bought off."<sup>28</sup> In two June 2007 decisions, the Delaware Chancery Court even temporarily

enjoined acquisitions of Lear Corporation and The Topps Company because public shareholders were not informed of the role that personal financial interests of management at the companies might have played in favoring private acquisitions.<sup>29</sup>

In addition, research indicates that company management, preceding a management buyout, tends to record lower than expected accounts receivable and otherwise engage in financial manipulation to make company performance look worse.<sup>30</sup> Public shareholders bear the brunt of these shenanigans.

Companies would be well-served to make any change in control payments subject to approval by the shareholders.<sup>31</sup> Greater and more timely transparency would also help to eliminate (or confirm) suspicions about the size and extent of executive compensation related to a proposed change in control.<sup>32</sup> Boards should make sure they are aware how large total change in control payments could be, well in advance of any transaction, in case they need to be revised. Excessive golden parachute payments, cash out of options, tax gross ups, forgiveness of corporate loans, unearned retirement program contributions and compensation that rewards poor performance are particularly objectionable to investors.

(3) **Independent Committees and Independent Advisors:** Inside directors, investment banks, compensation consultants and other advisors involved in transactions often have conflicts of interest. For example, payment of a success fee or use of "stapled" financing where the investment bank advising the target also provides financing to the acquirer, gives the investment bank a financial interest in ensuring success of the transaction. The prospect of future business from a serial acquirer or private equity fund could also bias an investment bank toward ensuring a transaction closes. Fairness opinions from investment banks with a vested interest in the transaction are loaded with litigation risk.<sup>33</sup> In addition, use of compensation consultants that also do significant work for management could result in the board receiving biased advice.

Boards could do a better job separating good from bad acquisitions by making more effective use of independent board committees and by retaining independent advisors to review the transaction. While inside directors may balk at the idea, the practice is becoming more prevalent. In a recent

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survey of corporate directors, 30 percent said that they always engage independent board advisors when contemplating a purchase or sale.<sup>34</sup> An additional 32 percent said that they “sometimes” engage an independent board merger and acquisition advisor.<sup>35</sup> Fifty four percent of the director respondents reported having voted down or materially changing a contemplated transaction.

Retention by the board of an independent investment banking firm with specialized industry knowledge can bring a fresh view to evaluation of a transaction and even identify alternatives. In order to be truly independent, the firm cannot be paid an incentive or success fee. Directors could also limit their legal exposure and the company’s downside risk by obtaining a (second, if necessary) fairness opinion from an independent valuation firm.<sup>36</sup> The board should not place restrictions on the fairness evaluation (such as unrealistic assumptions) that will reduce its reliability.

Finally, the success of a merger or acquisition does not depend solely on making the right decision up front. Integration planning and implementation are just as critical. Failure to address cultural differences and poor strategic planning or implementation are often cited as common reasons why business combinations fail. The board’s duties do not stop once a transaction has been closed. In fact, companies might want to consider deferring a portion of the fee of key advisors until integration plans have been executed. This would move the focus toward delivery on the promises cited when the deal was proposed and align advisors with long-term shareholders. Disclosure of the company’s advisors’ long-term merger and acquisition success rate in previous transactions would also be helpful to both the board and shareholders.<sup>37</sup>

(4) Corporate Governance Issues: The quality of a company’s corporate governance will often be evident in the way it approaches a potential transaction. Shareholders and their advisors will be evaluating the strategic rationale, process fairness, valuation decisions, conflicts of interest, executive compensation, use of takeover defenses and company governance profile to determine the quality of the company’s corporate governance. This will be an ongoing process that is done on a case-by-case basis. Proxy voting consultants usually play a key role in advising shareholders on transactions that require a shareholder vote, though

their recommendations may not be determinative for sophisticated institutional investors that make their own decisions on merger and acquisition transactions. Ultimately, shareholders will take corporate governance into consideration as one of the factors that are weighed when making a vote or tender decision.<sup>38</sup>

The more confidence shareholders have that a company’s board is aligned with the interests of its owners, functioning independent of management and acting in the shareholders’ best interests, the more likely shareholders will defer to the board’s recommendation. Clear communication with shareholders and their advisors is vitally important to establishing and maintaining this kind of trust. It is important that companies identify where, within the management structure of their large institutional shareholders, the final decision will be made on a vote or tender offer and engage with that part of the organization directly when issues arise.<sup>39</sup>

The following are among the corporate governance concerns that shareholders assess when considering whether a board is likely to act in the best interests of long-term shareholders when evaluating acquisitions:

- Are anti-takeover devices structured to insulate management or are they subject to shareholder approval?
- Does the company have a strongly independent board or is the board controlled by management?
- Is there a classified board structure that makes it difficult to change the board?
- Has the company adopted a requirement that directors receive a majority of the votes cast in order to be elected?
- Is there a supermajority voting requirement for approval of takeovers that allows minority or inside shareholders to block transactions?
- If the CEO is also Board Chair, is there an effective and independent lead director?
- Do the directors have individually significant holdings of company equity to align their interests with shareholders?

- Are excessive change in control or other gratuitous executive compensation payment provisions in place?
- Are executive compensation practices inconsistent with “pay for performance” principles, such that it appears the board has been captured by management or that management incentives are misaligned with shareholders?
- Have independent advisors been retained to assist an independent committee of the board in evaluating the transaction?
- Are success fee payments or other advisor conflicts of interest present in the transaction?
- Does the company have a history of successful mergers and acquisitions?
- What is the company’s corporate governance rating and what do the rating firms view as the company’s governance weaknesses?<sup>40</sup>
- Emerging Trends: Private equity deals have accounted for more than a third of all merger activity this year and 40 percent of US M&A activity this quarter, the highest level ever.<sup>41</sup> Private equity is reshaping the public markets with new trends such as “stub equity” where public shareholders can exchange some of their shares for securities in the new, privately owned company.<sup>42</sup>

Stub equity deals, such as the buyout of Harman International Industries Inc. by Kohlberg, Kravis, Roberts & Company (KKR) and Goldman Sachs Group Inc., have allowed public equity holders to participate in the upside value inherent in their equity. However, stub equity typically provides no shareholder rights to holders and leaves them at the mercy of the company’s new private equity firm managers.

In addition, private equity firms such as Blackstone and KKR are raising money through initial public offerings of their management subsidiaries, without making the public disclosures the Securities and Exchange Commission requires of Registered Investment Advisors—a feat described by some as cracking the code on how to function as a private company in the clothing of a public company.<sup>43</sup> Such structures leave shareholders of the

private equity management companies with little information and virtually no say in the company’s management or investment decisions.<sup>44</sup> The funds generated through these offerings also provide the private equity firms with additional capital that is controlled by the managers.

This creation of stub equity holders and private equity management firm shareholders, both with economic interests but virtually no governance rights, provides potential economic advantages for them while creating new agency risks from the inherent conflicts of interest they have with the private equity firm managers. Will the private equity firm managers find ways to divert value away from stub equity holders through generation of additional fees that are paid by the underlying companies to the management firms? Will they frustrate stub holders by engaging in balance sheet structuring that steers earnings away from equity?

One thing is certain, this new private equity environment will place even more pressure on public company boards to protect their shareholders from being taken advantage of in going-private transactions.

## Conclusion

Boards need to be keenly aware of the divergent interests of different shareholders. They are charged with balancing those interests in pursuing the creation of sustainable corporate wealth. Current evidence suggests that companies have generally not done a good job in handling mergers and acquisitions. However, by proactively seeking to develop a long-term shareholder base, addressing conflicts of interest, aligning executive compensation incentives with shareholders and adopting corporate governance best practices, boards could improve their merger and acquisition track record. Company advisors and consultants could also be more effective in helping to identify transactions that will build sustainable value.

## Notes

1. Robert Kindler, Vice Chairman for Investment Banking at Morgan Stanley recently said on a panel at the Corporate Law Institute at Tulane University, “We are all totally conflicted—get used to it.” Morgan Stanley advised the Tribune’s special committee of independent directors in the recent sale of

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the company. Stuart Goldenberg, "When a Bank Works Both Sides," *The New York Times*, April 8, 2007.

2. Net income in the past 12 months at the five largest investment banks has skyrocketed: Goldman Sachs: 56%, Morgan Stanley: 68%, Merrill Lynch: 110%, Lehman Bros.: 17%; and Bear Sterns: 31%. John Waggoner, "Investment Banks Benefit Most from M&A Mania," *USA Today*, May 25, 2007.

3. Peter Lattman and Dana Cimilluca, "Court Faults Buyouts," *The Wall Street Journal*, July 12, 2007, citing temporary injunctions issued by the Delaware Chancery Court in acquisitions of Lear Corporation and The Topps Company due, in part, to undisclosed compensation arrangements of private acquirers with the management of public companies.

4. For the first time, Continental European firms were as eager to participate as their U.S. and U.K. counterparts in the fifth M&A wave during the 1990s and M&A activity since January 1, 2007 is 63% higher than in 2006 on track to set another record. Mergers and Acquisitions in Europe, Marina Martynova and Luc Rennenboog, January 2006, SSRN.com; and "Huge deals fuel record-breaking M&A," *Financial Times*, May 7, 2007.

5. Directors and Boards, August Question of the Month, <http://www.directorsandboards.com/debriefing/September2006/qomaugust2006.html> (visited September 5, 2006).

6. For example, Robert F. Bruner, in his book "Deals from Hell," cites the AOL Time Warner merger as a champion of failed mergers, ultimately resulting in a US\$200 billion loss in stock market value and a US\$54 billion write-down in the combined company's assets.

7. "Institutional Investors' Trading Behavior in Mergers and Acquisitions, Rasha Ashraf and Narayanan Jayaraman, Georgia Institute of Technology, March 27, 2007, available at SSRN.com.

8 The volume of mergers and acquisitions during the first nine months of 2006 was at a record US\$2.7 trillion. Lina Saigol and James Politi, "Rise in Hostile Bids Pushes M&A to Record," *Financial Times*, September 29, 2006. According to Thompson Financial, from 2005 through July 13, 2007 there have been 1,287 leveraged buyouts with a total value of \$787 billion. Michael J. de la Merced, "An I.P.O. Glut just Waiting to Happen," *The New York Times*, July 15, 2007.

9. The Impact of Shareholder Power on Bondholders: Evidence from Mergers and Acquisitions, Angie Low, Anil K. Makhija, and Anthony Sanders, March 1, 2007, SSRN.com.

10. The Conference Board, "Institutional Investment Report 2005," citing ownership as of 2003.

11. *Id.*

12. Aviv Pichhadze, "Mergers, Acquisitions and Controlling Shareholders: Canada and Germany Compared," 18 *Banking and Finance Law Review* 341 (June 2003).

13. *Id.*

14. The Conference Board, "Report of the Commission on Public Trust and Private Enterprise," January 2003.

15. *Id.*

16. A recent study by Bernard Black and Henry Hu documented a number of instances where hedge funds and other investors have used swaps, short sales, derivatives, borrowed stock, hedging and other techniques to acquire voting rights on acquisitions in which they held no overall economic interest. The shares were then voted without regard to whether they believed the transaction would benefit the company. Henry T. C. Hu and Bernard Black, "The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership" 79 *Southern California Law Review* 811 (2006).

17. Lily Qui, "Which Institutional Investors Monitor? Evidence from Acquisition Activity," [http://www.econ.brown.edu/fac/lily\\_qui](http://www.econ.brown.edu/fac/lily_qui) (visited August 13, 2006).

18. *Id.* A one percent increase in mutual fund ownership was found to be associated with a reduction of six to 131 basis points in various 12-month returns, including the transaction announcement month.

19. Allocation of assets by the top 200 pension funds grew by 14 percent in 2005, to US\$97 billion, while allocations to hedge funds grew 42 percent, to US\$30 billion but still amounts to only about five percent of assets. Pensions & Investments, January 23, 2006. The number of private buyouts announced for European companies increased by 320 percent between 2001 and 2005. Jason Singer, "In Twist for Private Buyouts, Some Shareholders Fight Back," *Wall Street Journal*, August 18, 2006. Private equity deals in the United States are on track to be twice the value in 2006 than they were in 2005. Anna Driver, "Holders Sue Private Equity Firms Over Deals," *Reuters News Service*, November 15, 2006.

20. For example, the Blackstone Group took Celanese private in December 2003 in a deal it valued at US\$4 billion. One year later, it was sold back to public investors for US\$6.5 billion, with virtually no changes other than shifting its stock market listing the United States. Breaking Views, "On Going Private: Investors Beware," *Wall Street Journal*, November 18-19, 2006.

21. For example, where an institutional investor has combined passive and active portfolio holdings that total four percent of a company's public equity and ends up with a four percent stake in the private equity fund, it is likely that the investor will have lost at least 20 percent of its equity stake in the company to private equity fund fees and management's carried interest. If the company could have been turned around as a public company, the investor has essentially benefited the private equity fund managers and company executives at the expense of its own investors or beneficiaries. However, this loss will be largely invisible if the investor measures its performance against an index-relative benchmark. The investor's private equity portfolio managers will obtain a nice return, and the public equity portfolio managers will not be aware of the returns that were transferred elsewhere.

22. Several large investors, including Knight Vinke Asset Management, fought the sale of VNU to a group of private equity firms last summer, arguing that the small premium being offered did not merit leaving the rich profits on the table that the private equity investors would reap from quickly restructuring VNU. While the transaction eventually went through, the shareholders did win an increase in the purchase price. Jason Singer, "In Twist for Private Buyouts, Some Shareholders Fight Back," *Wall Street Journal*, August 18, 2006.

23. Company transactions involved in the lawsuit are Univision Communications, HCA Inc. and Harrah's Entertainment.

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24. Companies with long-term strategies might also want to undertake proactive efforts to establish a base of shareholders inclined to take a long-term view. This is one of the recommendations in the “Report of the Commission on Public Trust and Private Enterprise” issued by The Conference Board, January 2003.

25. In *Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) the Delaware Supreme Court said that boards could consider the disparate interests of short-term speculators and long-term investors and authorized boards to even favor long-term investors over shareholders who wanted a quick profit. However, once a board has decided to sell control of a company, they have an obligation to serve as auctioneers and get the best price for shareholders. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

26. Lucian Arye Bebchuk and Yaniv Grinstein, “Firm Expansion and CEO Pay” (November 2005). Harvard Law and Economics Discussion Paper No. 533. Available at SSRN: <http://ssrn.com/abstract=838245>.

27. For example, in the Celanese management buyout, the company’s executives are reported to have received option-related compensation that was worth US\$65 million when the company went public again, on top of salaries and bonuses. Breaking Views, “On Going Private: Investors Beware,” Wall Street Journal, November 18–19, 2006. In addition, the AFL-CIO recently challenged the proposed IPO of the Blackstone Group and the private equity firm’s claim that it is not an investment company so it can sell its shares to the public without being regulated by the Securities and Exchange Commission under the Investment Company Act of 1940. “Union Takes Aim at Blackstone I.P.O.,” The New York Times, Dealbook, May 16, 2007.

28. The California Public Employees Retirement System recently opposed a merger of United Health Group with PacifiCare Health Systems unless the companies held a shareholder vote on proposed executive bonuses to be paid in the transaction. In 2005, Molson reduced change in control payments to satisfy shareholders before its merger with Adolph Coors.

29. After listing the financial advantages offered to management by a private acquirer, the Delaware Chancery Court concluded, “Put simply, a reasonable stockholder would want to know an important economic motivation of the negotiator singularly employed by a board to obtain the best price for the stockholders, when that motivation could rationally lead that negotiator to favor a deal at a less than optimal price, because the procession of a deal was more important to him, given his overall economic interest, than only doing a deal at the right price.” *In Re: Lear Corporation Shareholder Litigation*, C.A. No. 2728-VCS (June 15, 2007). The deal was subsequently rejected by Lear shareholders. See also *In Re: The Topps Company Shareholders Litigation*, C.A. No. 2786-VCS (June 14, 2007).

30. Carol A. Marquardt and Christine I. Wiedman, “How are Earnings Managed? An Examination of Specific Accruals,” *Contemporary Accounting Research*, Vol. 21, No. 2, Summer 2004.

31. On April 20, 2007, the U.S. House of Representatives passed “The Shareholder Vote on Executive Compensation Act” by a vote of 269–134., which is also applicable to merger

and acquisition transactions. <http://financial.services.house.gov/ExecutiveCompensation.html>. The bill will move next to the Senate Banking Committee.

32. In management buyout situations, outside shareholders would benefit from obtaining full knowledge of all consideration that is or will be paid to management. The conflicts of interest associated with management participation in a buyout from outside shareholders are especially troublesome.

33. The National Association of Securities Dealers has been investigating concerns about conflicts of interest in the issuance of fairness opinions. It has proposed a disclosure-based approach to highlighting conflicts which many view as inadequate to address the fundamental flaws associated with using conflicted financial advisors. Federal Register, Vol. 71, No. 69, April 11, 2006.

34. Directors & Boards, “The Directors & Boards Survey: Mergers & Acquisitions,” Boardroom Briefing, Fall 2006.

35. Id. The most common independent advisors directors reported using were the board’s law firm (31 percent), the board’s own M&A firm (27 percent) and the board’s accounting firm (27 percent).

36. For example, recent deals where independent fairness opinions were obtained include sales of May Department Stores, Albertsons, Constellation Energy, Sungard Date Systems, Dex Media and Texas Instruments’ sensors and controls business. See Jeffrey Williams, “What Directors Need to Know About Fairness Opinions,” Boardroom Briefing: Mergers & Acquisitions, Directors & Boards, Fall 2006.

37. An analysis done for the New York Times by Capital IQ, a business unit of Standard & Poors, shows that the track record for buyer performance after a major acquisition varies substantially between investment banks involved in advising buyers. “*They’re All No. 1, but Are They Worth It?*” The New York Times, Dealbook, August 5, 2007.

38. Institutional investors that are not happy with a proposed transaction may publicly oppose it. For example, the California Public Employees Retirement System recently opposed a merger of United Health Group with PacifiCare Health Systems because of executive bonuses to be paid in the transaction.

39. Some institutional investors will delegate responsibility to their external investment managers and some will retain final authority, with decisions made by the chief investment officer, portfolio manager, proxy voting administrator or other officer.

40. Several shareholder advisory firms (e.g., Institutional Shareholder Services, Governance Metrics International and The Corporate Library) evaluate and rate companies on their corporate governance.

41. Dana Cimilluca, “Private Equity Fuels Record Merger Run,” Wall Street Journal, July 20, 2007.

42. Dennis Berman, “Unusual Buyout Offers a Piece to Shareholders,” Wall Street Journal, April 27, 2007.

43. Henry Sender and Monica Langley, “How Blackstone’s Chief Became \$7 Billion Man,” Wall Street Journal, June 13, 2007.

44. Dennis Berman, “Latest Trend in Big Buyouts: Blend of Public, Private Traits,” Wall Street Journal, May 22, 2007.