Reinhart

Good News for Banks: Legal Developments Pave the Way for Strategic Transactions

Two recent legal developments may make it easier for your bank to enter into strategic transactions, whether through a sale, merger or other change in control:

1. **Directors' Duties in Sale Clarified**. The Delaware Supreme Court recently held that a board of directors does not need to actively shop a company before or after signing a merger agreement and can negotiate with only a single bidder in seeking a sale, so long as the board does not prevent the ability of alternative buyers to submit bids.1 As you may know, a board of directors must seek to ensure shareholders get the highest value for their shares in a transaction resulting in a change in control of the bank. We have often been asked whether a board of directors must actively shop for bids in order to determine the best value for shareholders. In this recent Delaware case, the board of directors of the selling entity entered into a merger agreement which included a "fiduciary out," allowing the board to entertain alternative bids. The board did not, however, actively shop the company. The lower court enjoined the transaction, stating that the selling board must engage in an auction in order to ascertain the best value for shares. Reversing the lower court's decision, the Delaware Supreme Court noted that there is no specific route that a board must follow when fulfilling its fiduciary duties. The Court held that a board can satisfy its fiduciary duties without conducting an active market check "so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal." The Court made clear that directors are required to provide an effective market check, but such a check can be passive; in this case there was an effective market check because there was a five-month period where another bid could have emerged, the buyer had a "fiduciary out" and there was an informed board. Note that though this case was decided in Delaware and is not binding in Wisconsin, many courts look to Delaware case law when analyzing corporate issues.

2. **FRB Proposes to Increase Asset Threshold to $1 Billion for "Small**

POSTED:

Mar 20, 2000

RELATED PRACTICES:

Banking and Finance
https://www.reinhartlaw.com/practices/banking-and-finance

RELATED PEOPLE:

James A. Sheriff
https://www.reinhartlaw.com/people/james-sheriff

John T. Reichert
https://www.reinhartlaw.com/people/john-reichert

Melissa Y. Lanska
https://www.reinhartlaw.com/people/melissa-lanska

Bank Holding Company Policy Statement" - Leverage and Capital Implications for Community Bank. In 2014, Congress passed a law requiring the Federal Reserve Board to expand the applicability of the Board's *Small Bank Holding Company Policy Statement* ("Policy Statement") for small bank holding companies as well as certain savings and loan holding companies. Currently, bank holding companies with less than $500 million in total consolidated assets may be subject to the Policy Statement, so long as certain qualitative requirements are met. The Policy Statement aims to facilitate the transfer of ownership of small community banks by allowing their holding companies to operate with higher levels of debt than would otherwise be permitted.2 The Policy Statement makes it easier for covered bank holding companies to issue debt and raise capital, which enhances the ability of these institutions to engage in strategic transactions by allowing them increased access to debt. Specifically, institutions qualifying under the Policy Statement may have a debt-to-equity ratio of up to 3:1 in a proposed acquisition, subject to certain requirements. This is a higher debt-to-equity ratio than is permitted in acquisitions by institutions not covered by the Policy Statement. Moreover, under the Policy Statement, the capital adequacy test for covered institutions occurs at the bank level only. The proposed rule expands the applicability of the Policy Statement and allows bank holding companies and savings and loan holding companies with up to $1 billion in total consolidated assets to qualify for coverage under the Policy Statement. Comment period ended on the proposal on March 4, 2015, so stay on the lookout for a Final Rule from the Federal Reserve in the coming months.

If you have questions about these legal developments, please contact James A. Sheriff, Melissa M. York or John T. Reichert.

---

[1] See C & J Energy Services, Inc., et al. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust, No. 655/657, 2014 WL 7243153 (Del. Dec. 19, 2014).

[2] Federal Reserve System, Docket No. R-1509, *Small Bank Holding Company Policy*

Statement; Capital Adequacy of Board-Regulated Institutions; Bank Holding Companies; Savings and Loan Holding Companies; Changes to Reporting Requirements, available at Federal Reserve.