The Calculus of Going Hostile: Recent Lessons from the Field

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Since Valeant/Pershing Square’s high profile offer for Allergan last year, there have been 12 unsolicited, public offers by strategic bidders for U.S. listed companies (not including Mylan’s recent $29 billion offer for Perrigo which, at the time of writing, was still unresolved). It is clear that these hostile bids have been bold, headline-grabbing, and exciting for deal junkies. But it is equally clear that hostile bidders have been remarkably unsuccessful in ultimately acquiring their targets.

Of the 12 hostile bids:

- Three (AbbVie/Shire, Waterton Metals/Chaparral, and HudBay Minerals/Augusta Resource) resulted in a signed merger agreement between the original hostile bidder and the target. And of those three, only Waterton and HudBay actually closed. AbbVie ultimately terminated its merger agreement with Shire due to adverse changes in the U.S. tax inversion regulations.

- Five bidders withdrew their bids after being publicly rebuffed by their targets, including Simon/Macerich, 21st Century Fox/Time Warner, Zara/Altai and Knight Transportation/USA Truck.

- Three bids resulted in the target being sold to a white knight (Valeant/Allergan where Allergan ultimately agreed to be acquired by Actavis, Charter Communications/Time Warner Cable where Time Warner Cable ultimately agreed to be acquired by Comcast, and Goldcorp/Osisko where Osisko ultimately agreed to be acquired by Yamana Gold and Agnico Eagle Gold).

- One (Endo’s bid for Salix) failed to disrupt the already announced friendly deal in which Valeant had agreed to buy Salix.

These recent transactions provide some lessons for would-be hostile bidders in the current environment.

Be Prepared to Lose. Most recent hostile bidders failed to acquire their targets. The reasons vary and include changes in law, the appearance of white knights, the failure to maintain pressure by raising bids, and SEC disclosure issues. What is sure, however, is that a publicly announced hostile offer is no sure thing.
Hold Some Chips. The only successful hostile bids (including for these purposes AbbVie/Shire) included meaningful and numerous price increases. In AbbVie/Shire there were four raises which resulted in an increase of 10% from the original bid. In Waterton Metals/Chaparral there were two raises which resulted in an increase of 21% from the original bid. In HudBay/Augusta there were two raises which resulted in an increase of 11% from the original bid. Hostile bidders therefore not only need thick skins, but also thick wallets, and the ability to ignore the old adage about “not bidding against yourself.”

Proxy Threats May Backfire. Interestingly, all three hostile deals in which the target was ultimately sold to a white knight involved an active threat by the hostile bidder to try to change the target’s board of directors. In Goldcorp/Osisko, Goldcorp nominated its own slate of eleven directors in a proxy contest to replace Osisko’s board at its annual shareholder meeting. In Valeant/Allergan, Pershing Square sought a special meeting to replace six out of nine Allergan directors after it acquired a 9.7% stake in the target. In Charter Communications/Time Warner Cable, Charter nominated a slate of thirteen candidates for Time Warner Cable’s annual shareholder meeting. These experiences suggest that threatening to remove directors may, instead of increasing pressure on the target to negotiate with the bidder, trigger an “anyone but them” response.

Consider a Toehold. The happiest loser of all the recent failed hostile bidders is surely Pershing Square, which partnered with Valeant and, as a result of having accumulated approximately 9.7% of Allergan, reaped a reported $2.6 billion profit when Allergan was sold to Actavis. White knight outcomes are in no way certain and, without a white knight, target stock prices can take a beating if a hostile bid is withdrawn. So the taking and disposition of toehold positions must be considered with care. This care is not just a commercial matter, but also a legal matter given Section 13D reporting thresholds, Section 16(b) short swing profit rules, and insider trading and market manipulation prohibitions.

Politics Counts. Hostile bidders should not underestimate the power of politics. When AbbVie terminated its deal with Shire due to the sudden change in U.S. tax inversion rules, AbbVie had to pay Shire a termination fee of $1.6 billion.

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