

M&A Oversight in 2025: What Directors Must Get Right

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**BOARDROOM
SUMMIT**

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Key Takeaways

Role of M&A in a Company's Lifecycle

2025 U.S. M&A Landscape: Key Themes

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- **Policy and regulatory uncertainty**
 - Tariff volatility and evolving antitrust enforcement trends continue to influence deal activity and timing
- **Disruptive technology and digital transformation**
 - As tech M&A remains dominant, M&A processes are integrating a heightened due diligence focus on AI, data privacy and cybersecurity risks
- **Portfolio optimization**
 - Corporate simplification through divestitures/separations continues to gain traction across sectors
- **Shareholder activism**
 - Activists are targeting M&A strategy and execution in today's complex geopolitical and economic climate
- **Cross-border M&A activity**
 - Global push for innovation and expansion remains active despite geopolitical instability

Why Do Companies Pursue M&A?

Buy-side

- Horizontal growth strategy to expand the business
- Vertical consolidation
- Entering new markets and product offerings
- Acquiring technology and AI for digital transformation

Sell-side

- Rebalancing portfolio of businesses
- Selling lower-margin businesses
- Selling businesses that have higher potential in other hands
 - Capital allocation
 - Management focus
- Company reaching its maturity and is ready to be part of a larger enterprise

Why the Board Should Be Involved

- M&A should be part of strategy
 - Board's oversight of M&A is crucial, especially across lifecycle stages
- Management benefits from Board members' experience
 - Setting criteria for deals
 - Objective assessment – “don't fall in love with the target”
 - Challenge assumptions
 - Integration planning
- Governance for M&A processes
 - Guidelines
 - Oversight
 - Not tactical “second-guessing”

Board's Questions for Management

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- **Before the Deal**
 - Does management have a defined M&A strategy?
 - Who is responsible for M&A strategy?
 - Who provides objective assessment of organic growth vs. M&A?
 - On sell-side – have you put yourselves in the shoes of a buyer?
 - On buy side - what key risks and implementation requirements need to be considered?
- **During the Deal**
 - Have diligence and integration teams been working side by side?
 - Is diligence comprehensive?
 - Cultural integration – what human capital issues need to be considered?
 - Are synergies assumptions realistic?
 - For international deals – do we understand geopolitical and regulatory risks?
 - Do we have a plan for integration?
- **After the deal**
 - Has integration been successful?
 - What are objective findings and lessons learned after 6 months, 12 months, 18 months?

Buy-Side Transactions: Board's Role

Board Actions in a Buy-Side Role

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- **The Board's oversight role**
 - Evaluate acquisitions as part of overall corporate strategy
 - Stay informed - delegation of authority
 - Set approval thresholds at certain size (e.g., dollar limits)
 - Identify any other escalation triggers
 - In pursuing a specific deal -
 - Take a disciplined approach in selecting targets/businesses
 - Maintain oversight of valuation, diligence, savings and synergies determinations and integration plan
 - Maintain auction processes and price/terms discipline
 - Monitor antitrust analysis and considerations
 - Understand geopolitical and other regulatory risks
 - Determine if stockholder approval is required

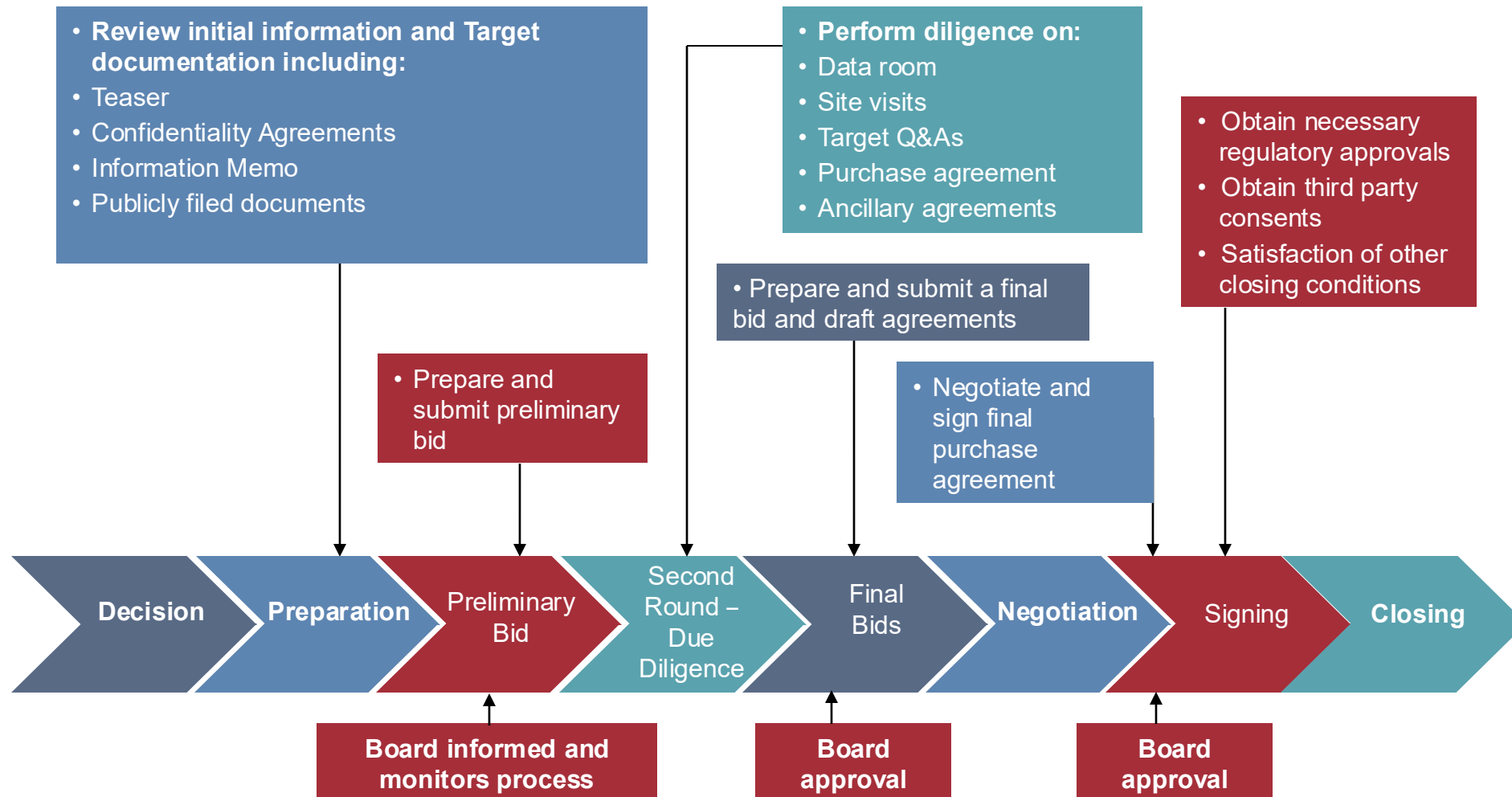
Board Actions in a Buy-Side Role (cont.)

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- The Board oversees the Company's management and the overall direction of the Company:
 - Approve the ongoing strategy and business plan
 - Monitor the growth trajectory, including whether M&A is the proper means to achieve growth
- Even when a Company is not on a growth track, the Board continues to monitor M&A opportunities:
 - Stay abreast of industry and market developments and M&A opportunities
 - Consult with industry experts and financial advisors on potential M&A opportunities
- The full Board or a Board committee will oversee ongoing buy-side M&A transactions

Process



Preparation

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- A preliminary bid is non-binding and would not require the Board's approval prior to submission
 - The Board or a Board committee should be kept informed of
 - the results of diligence
 - the confidential information memorandum provided by the Target
- Management and advisors may provide presentations/updates to the Board on the initial diligence and discussions with the Target

Diligence Results

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- Prior to the submission of a final bid, the Board reviews information from the data room, financials, site visits, management presentations, and transaction agreements:
 - Summary of due diligence
 - Valuation of the Target
 - Identification of potential synergies
 - Assessment of key risks
 - Implementation plans
 - Integration requirements and plans

Final Bid

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- Once the Board has reviewed the diligence information, the Board approves the final bid
 - Legal and financial advisors facilitate the meeting and present valuation analyses and key terms of the bid
 - For some M&A transactions, summary of key issues or risks is discussed with the Board
- The Board may have input on the framework of the final negotiations, including terms of the agreements
 - Maintains oversight responsibility and sets parameters for delegation of authority

Signing

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- When negotiations are complete, the Board may receive an update on the terms, including any substantive changes since the bid
- The Board should be informed on (1) how the risks identified in diligence are addressed and (2) key obligations on the Company
- The Board formally approves the transaction

Implementation & Anti-Trust Requirements

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- The Board and management need to be conscious of the risks of sharing information with a competitor before and during negotiations
- In a buy-side transaction involving a competitor, need to minimize the sharing of any competitively or commercially sensitive information
 - Examples: current and future price information, strategic plans, product offerings, and specific cost and discounting practices
 - The FTC has specifically found that the sharing of non-aggregated, customer-specific information, including pricing plans during a merger process between competitors, was particularly harmful and inappropriate
 - The Company and the Target are independent businesses and must operate independently prior to closing

Implementation & Anti-Trust Requirements (cont.)

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- The Board should oversee the implementation process of the transaction and integration of the business
- The Board and management should have effective protocols to prevent anticompetitive information sharing during negotiations
 - Anti-trust counsel develops protocols and reviews materials prior to dissemination
 - Competitively and commercially sensitive information can be provided to a “Clean Team” that excludes personnel responsible for planning, pricing, or strategy
- The Board and management should ensure that the same protocols are in place for integration planning after signing and prior to closing

The Hard Part: Making It Work

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- Market Acceptance
 - Reality vs. promises
- Credibility:
 - Synergies
 - Accretion or dilution
 - Sources of growth
 - Accountability
 - Integration plan
 - Operations
 - Culture
 - Strategy

Top Considerations

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1. Beware of falling in love with the business you are buying
2. Is every transaction “transformative”?
3. M&A is a part of overall company strategy – does the deal fit it?
4. M&A is not a panacea for a problem
5. Who is delivering on synergies?
6. Are there “details” that someone else will figure out?
7. Integration is harder than negotiations
8. Culture and cultural fit make all the difference

Sell-Side (“Considering Strategic Alternatives”): Board’s Role

Threshold Questions

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- If you are a director of a U.S. public company target, it is practically certain that your transaction will be challenged in shareholders' litigation
 - **Threshold questions to consider:**
 - Why are we considering strategic alternatives? Should we be considering a sale? Is this the right time?
 - Who or what is driving it?
 - Who are potential transaction counterparties?
 - Depending on the answer, you may need additional safeguards
 - Does the transaction potentially involve conflicted parties?
 - Stockholders, directors or advisors

Board Actions in a Sell-Side Role

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- If the Board decides the Company should engage with a potential acquiror, a well-run process will help protect the transaction if/when challenged
- **At the outset, the Board should:**
 - Consider the timing of the transaction – is it the right time to sell?
 - Where is the Company in implementing its strategic plan or realizing the benefits of past actions?
 - What are the Company’s recent financial results?
 - How has the Company’s stock traded recently (including relative to the broader market)?
 - Determine if the transaction involves a conflict of interest – who is driving the transaction?
 - Does the Company have a controlling stockholder and, if so, what are its motivations?
 - Is management on both sides of the transaction? – e.g., if the Company is being sold to a private equity firm
 - Are any directors not independent for purposes of the transaction?
 - Depending on the answers to these questions, a special committee may be necessary (or useful)

Board Actions in a Sell-Side Role (cont.)

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- Identify and engage third party advisors - ensure directors are made aware of any material relationships between the advisors and potential acquiror
 - Consider whether the Board should retain its own separate advisors or if the Company should retain new advisors – are the Company’s existing advisors too close to management?
- Determine who will lead the negotiations on behalf of the Company – is a controlling stockholder or the senior management team conflicted?
- Determine the sales process: (1) negotiate exclusively with a single potential acquiror, (2) conduct a “market check,” (3) launch an auction sale process
- Anticipate and prepare for the implications of the transaction - management distraction, business disruption, stockholder reaction, regulatory risk

Board Actions in a Sell-Side Role (cont.)

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- **During negotiations, the Board should:**
 - Evaluate transaction certainty and execution risk, including financing risk and regulatory risk
 - In an auction sale, make sure there is a “level playing field” among potential acquirors
 - Instruct management and potential acquirors not to engage with each other regarding post-closing employment arrangements until the essential terms of the transaction have been agreed
 - Endeavor to make sure that neither management nor the Company’s financial advisor engages in unauthorized communications with any potential acquiror
 - Consider the transaction protections - “go-shop” versus “no-shop,” “fiduciary out” versus “force the vote,” termination fee size

Board Actions in a Sell-Side Role (cont.)

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- **Between signing and closing, the Board should:**
 - Monitor stockholder reaction to the transaction and, if required, engage with stockholders
 - Review, understand and have an opportunity to discuss with the Company's management and advisors the Company's communication and disclosure materials, including the proxy statement
 - In particular, the background section and the reasons for the transaction
 - Monitor the Company's compliance with the terms of the transaction agreement, including the conduct of business covenants
 - Monitor the regulatory process, including the status of any requests by regulatory authorities for additional information
 - If applicable, respond to any competing acquisition proposals in accordance with the terms of the transaction agreement

Approval of a Sale of a Company – Enhanced Scrutiny (Revlon)

- In situations involving the sale of control for cash, Delaware courts will not defer to Board’s decisions under the Business Judgment Rule
 - Board action is instead subject to judicial review under an “enhanced scrutiny” standard (the so-called “**Revlon duty**”)
 - When Revlon duty applies, directors must maximize the short-term value to stockholders by securing the best transaction for the Company that is realistically available
 - Directors’ duties change from those of “stewards” of the Company’s long-term welfare to “auctioneers”
- In applying Revlon, Delaware courts will generally:
 - Permit the Board to design a process intended to produce the best transaction realistically available with the least disruption to the Company
 - Intensely scrutinize treatment of bidders
 - Allow the Board latitude in determining the value of competing transactions, if the decision is reasonable
 - Allow a Board acting in good faith and upon reasonable investigation to consider differences in the timing and certainty of closing of competing transactions
- If a court determines that the directors failed to satisfy their Revlon duties, the transaction could be enjoined

The Board's Recommendation of a Sale of a Company

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- In a public company acquisition, the Target Board is typically required to recommend that its stockholders vote in favor of the proposed transaction (or tender their shares into a tender offer)
- Merger agreements contain limitations on the Target Board's ability to subsequently withdraw or qualify its recommendation
 - But there are typically exceptions, referred to as "fiduciary outs," that permit the Target Board to change its recommendation under certain circumstances, including with respect to a so-called "intervening event" as a trigger for a Target Board's ability to change its recommendation

Key Takeaways

Key Takeaways

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- In an M&A process (buy-side or sell-side), a public company director should:
 - Stay engaged and informed
 - Ask the right questions
 - Why we are doing it?
 - Who is driving it?
 - Is the timing right?
 - Is the right process in place and are the right people involved?
 - What are the key value drivers?
 - What are the risks of doing the deal and what are the risks of not doing it?
- M&A is about value and risk
 - For the Board, M&A is not just a corporate function, it's part of the Company's long-term strategy to create value...
 - With the risk that a wrong deal may destroy value