October 30, 2013

Mergers

The October 29, 2013 New York Times Deal Book article, “Frenzy of Deals, Once Expected, Seems to Fizzle,” has resulted in a number of requests for me to discuss merger activity and predict the level of future merger activity. In the course of a long career of advising on mergers, I’ve identified many of the factors that determine merger activity, but a complete catalog is beyond me and I am not able to predict even near-term levels of merger activity. Since the 1980s, I’ve written and lectured extensively on this and the history of merger waves, and I regularly revise an outline of the factors that I believe are the most significant that influence mergers. This is a condensed version of the outline:

First, it is recognized that mergers are an integral part of market capitalism, including the types that are practiced in Brazil, China, India and Russia. Mergers are an element in the Schumpeterian theory of creation and destruction of companies that characterizes market capitalism.

Second, the autogenous factors, not in the order of importance, are relatively few and straight forward:

- Increasing revenue and profitability by product or geographic expansion, acquisition of talent and intellectual property or by increasing market power.
- Reducing costs by eliminating excess capacity and/or labor.
- Confidence of the management and the board of directors of the acquiring company that it can effectively integrate the acquired business.
- Ego and the desire for size and diversity without regard to profitability.
- A desire to remain an independent company and sense of responsibility to all stakeholders, i.e., employees, customers, suppliers, creditors, and communities, as well as shareholders.

Third, the exogenous factors, again not in the order of importance, are:

- Availability of accounting conventions (principally those relating to depreciation and amortization) that enhance, or at least do not detract from, profitability.
- Pressure from activist hedge funds and lack of support from institutional investors to remain an independent public company seeking long-term creation of value.
- Government antitrust and competition policies.
- Availability of arbitrage to facilitate liquidity for securities that result from mergers.

If your address changes or if you do not wish to continue receiving these memos, please send an e-mail to Publications@wlrk.com or call 212-403-1443.

W/2434948

- Foreign exchange fluctuations that make one currency "cheap" and the other more favorable as merger consideration.
- Regulation and deregulation and privatization and nationalization by governments.
- National policies to encourage "global champions" or to discourage foreign investment.
- The availability of experts in merger technology and in the creation of special merger currencies, such as contingent value rights and pay-in-kind debentures.
- Recognition of the legitimacy of hostile takeover bids and proxy fights and the availability of experts in the waging of hostile efforts to achieve a merger.
- Labor unions, government labor policies and the political and popular power of labor generally.
- The existence of private equity funds and the amount of funds that they have available for acquisitions.
- The state of the equity and debt markets and the receptivity of the markets and banks to merger activity.
- Litigation, shareholder and class actions designed to enjoin mergers or increase the cost.
- Taxes, tax policies and potential changes therein.
- Demographic changes.
- General business and political conditions.
- Technological developments, especially breakthroughs.
- Military research, military procurement and military policies with respect to suppliers and contracting.
- Trade treaties and the creation of trade and currency blocs of nations.

Lastly, it is recognized that the interrelation of all or some of these factors creates the permutations and combinations of issues that at any given time affect mergers and make it impossible to predict the level of future merger activity.

Martin Lipton