



LEGAL ALERT

January 18, 2018

Considering a Transaction?

Don't Expose Yourself to Liability by Hiring an Unlicensed Investment Banker

When considering an acquisition or merger (“M&A”) transaction, boards of directors often employ investment bankers to perform due diligence, prepare statistical analyses, provide financial advisory services and, above all, render an opinion that the transaction as approved by the board of directors is fair to shareholders from a financial perspective. Although many investment banking firms are licensed with appropriate governmental and self-regulatory organizations to provide these services, there are those which provide these services without the benefit of such licensure (“Non-Licensed Person”).

Under the Pennsylvania Business Corporation Law (“BCL”), boards must exercise a duty of care (i.e. the director exercised reasonable diligence in making the decision) and a duty of good faith (i.e. the director honestly and rationally believed his decision was in the best interest of the corporation). Under the BCL, a director, in performing his duties, is entitled to rely in good faith on information, opinions, reports or statements by persons as to matters which the director reasonably believes to be within the professional or expert competence of such person.

The Business Judgment Rule in Pennsylvania protects a board member from liability in civil suits against individual directors or suits brought on behalf of the corporation as a court will not invalidate a director’s business decision if the decision was made on a fully-informed basis, without self-interest, in good faith, and in the honest belief that the decision was in the best interests of the corporation and its shareholders.

If a board hires a Non-Licensed Person to render a fairness opinion and relies on such fairness opinion in approving the M&A transaction, the board may not have adequately fulfilled its duties of care and good faith and, therefore, the Business Judgement Rule may not be available as a defense to a civil action for a director’s breach of fiduciary duty.

Because many M&A transactions involve securities transactions under federal and state law, it is critically important to hire an investment banking firm that is a registered broker-dealer with the U.S. Securities & Exchange Commission (“SEC”), the Financial Industry Regulatory Authority (“FINRA”) and the securities commission of the states in which the firm conducts business (a “Licensed Person”).

The SEC has indicated that those who participate in important parts of a securities transaction, receive compensation in connection with the transaction that is dependent upon or related to the outcome or size of the transaction, or persons who are engaged in the business of facilitating securities transactions, may need to register as broker-dealers. Investment bankers who render fairness opinions implicate several if not all of those factors; thus, creating vulnerability for the company and the board of directors if the investment banking firm is not a Licensed Person.

Bybel Rutledge LLP
1017 Mumma Road, Lemoyne, PA 17043
Phone: 717-731-1700
Fax: 717-731-8205
Website: www.bybelrutledge.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship.

Selecting a Licensed Person to render a fairness opinion provides an additional layer of protection for the corporation and its board for the following reasons:

- Licensed Persons have been vetted to ensure that there exists no prior history that would form a basis from disqualifying them from participating in the securities industry;
- Licensed Person have been qualified to render services by taking and passing a FINRA examination;
- Licensed Person are obligated to make public disclosures with FINRA thereby providing publicly available due diligence information to the board of directors;
- Licensed Persons are subject to government oversight by the SEC, FINRA, and state securities agencies and are required to maintain appropriate policies and procedures relating to issuance of fairness opinions and reasonably supervise those who render fairness opinions; and
- Licensed Persons who render fairness opinions contained in a registration statement filed with the SEC are subject to certain mandatory conflict of interest disclosures.

To avoid potential shareholder suits against the board of directors for failing to exercise a their duty of care and duty of good faith in context of obtaining a fairness opinion in a M&A transaction, we strongly urge boards to retain only qualified Licensed Persons to render such fairness opinion.

If you would like additional information, please contact any of the following members of Bybel Rutledge LLP at (717) 731-1700 or at their respective email addresses:

Nicholas Bybel, Jr., Esq.
(bybel@bybelrutledge.com)

G. Philip Rutledge, Esq.
(rutledge@bybelrutledge.com)

L. Renee Lieux, Esq.
(lieux@bybelrutledge.com)

Erik Gerhard, Esq.
(gerhard@bybelrutledge.com)

Carter D. Frantz, Esq.
(frantz@bybelrutledge.com)

Tara A. Burns, Esq.
(burns@bybelrutledge.com)

The foregoing is provided solely for informational purposes. Neither this document nor the lawyers who authored it are rendering legal or professional advice or opinions on specific facts or matters. Distribution of this document to any person does not constitute the establishment of an attorney-client relationship.



Trusted Advisors to Companies...Every Step of the Way.SM