

Lead Director Network ViewPoints

Issue 6 March 29, 2010



The lead director's role in major transactions

Introduction

The sixth meeting of the Lead Director Network (LDN)¹ was held in New York City on March 2, 2010. Members discussed two topics: the lead director's role in major transactions and the lead director's role in board succession planning.²

ViewPoints reflects the network's use of a modified version of the Chatham House Rule, whereby names of members and their company affiliations are a matter of public record, but comments made before, during, and after meetings are not attributed to individuals or their companies. Members' comments at the meeting are shown in italics. For further information about *ViewPoints*, see "About this document," on page 8.

The lead directors who participated in the meeting included:

- Frank Blount – Presiding Director, Caterpillar; Lead Director, KBR
- Roy Bostock – Non-executive Chairman, Yahoo!
- Peter Browning – Lead Director, Nucor
- Dan Carp – Non-executive Chairman, Delta Air Lines
- Ray Gilmartin – Lead Director, Microsoft; Presiding Director, General Mills
- Dick Goldstein – Presiding Director, Interpublic Group
- Bonnie Hill – Lead Director, Home Depot
- Karen Horn – Presiding Director, Eli Lilly
- Phil Humann – Presiding Director, Coca-Cola Enterprises and Equifax
- Ed Kangas – Non-executive Chairman, Tenet Healthcare
- Linda Fayne Levinson – Lead Director, NCR
- Jack O'Brien – Lead Director, TJX; Non-executive chairman, Cabot
- Ken Powell – Lead Director, Medtronic
- Jim Robinson – Presiding Director, The Coca-Cola Company
- Wes von Schack – Lead Director, Bank of New York Mellon

King & Spalding partners participating in the meeting were:

- J. Kelley, Partner, Corporate Practice Group
- Chris Wray, Partner, Chair Special Matters and Government Investigations Group

¹ The LDN brings together a select group of lead directors, presiding directors, and non-executive chairs from Fortune 500 companies for private, candid discussions about ways to improve board governance. For the purposes of this network, the term *lead director* is used to refer to all three titles – lead director, presiding director, and non-executive chairman – except where otherwise stated.

² See Lead Director Network, "[The lead director's role in board succession planning](#)," *ViewPoints*, March 29, 2010.

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Executive summary

One member said, “[major] transactions are a bet-the-company kind of event.” If a major transaction is timely and executed properly, a company can emerge stronger than ever. If a transaction is ill advised or poorly executed, the company can be ruined. Within this context, the lead director’s role as an adviser to management and the board throughout a major transaction is critical. During the March meeting, LDN members, many of whom have been involved in major corporate transactions, focused on the following themes which are discussed in more detail on the following pages:

- **Factors affecting the lead director’s role in major transactions** (Page 2)

Members identified a number of factors that influence the lead director’s level of involvement in a major transaction. On the whole, these factors fall into two categories: the structure and nature of the transaction and the previous experience of the people involved. Lead directors typically have greater responsibility if the transaction is large and complex, if a bidding war ensues, if a company receives a hostile takeover bid, or if the management team and/or board have limited experience with major transactions. Lead directors play a less significant role in small- to mid-sized transactions or in situations where the company has a track record of successfully executing major transactions.

- **The lead director’s responsibilities during a major transaction** (Page 3)

During the meeting, members identified seven key responsibilities for lead directors during a major transaction: (1) working with the CEO and management team, (2) facilitating discussion among board members, (3) helping the board evaluate a transaction within the company’s strategic framework, (4) determining whether to form a special committee, (5) interacting with external advisers, (6) communicating with shareholders, and (7) monitoring the success of a transaction. In addition, members described a special set of responsibilities for lead directors in a merger of equals.

Factors affecting the lead director’s role in major transactions

Members identified two primary categories of factors that shape the lead director’s overall level of involvement in a major transaction: the structure and nature of the transaction and the previous experiences of the people involved.

- **Size of the transaction.** The lead director often assumes a prominent role in large, complex transactions, such as a merger of equals.³ One member stated, “*The lead director sets the tone for the rest of the board ... We [lead directors] help define the company’s approach [to the merger] and make sure that this is communicated to the rest of the board and down to management.*” In contrast, smaller transactions may not require significant involvement from the lead director: “*We have a committee of the board that reviews all our transactions. Some smaller transactions are approved at the committee level and don’t go to the full board for review ... [As lead director,] I have to keep the board informed [of these transactions], but [my role] is pretty straightforward.*”

³ For the purposes of this discussion, members defined a merger of equals as any transaction in which the board of the newly merged company is significantly altered as a result of the transaction.

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- **Company context.** Lead directors whose companies have successfully executed numerous transactions often do not play a significant role in the transaction process: *“Some companies develop a core competency of knowing how to acquire. [These companies] understand the cultural issues, and they know how to check in about what has worked and what hasn’t worked in the transaction ... [At these companies,] the board gains trust in the company’s process, and the acquisition process becomes much easier.”*
- **Industry context.** One member observed that bidding wars for acquisition targets are common in certain industries. These *“auctions”* often accelerate the acquisition process, requiring immediate action from the board: *“The board was prepared six months in advance with potential targets, and I let them know that sometimes the timeline is very fast and the bidding war begins, and we should be familiar with the targets before that time.”*
- **Deal structure.** If one company launches a hostile takeover bid for another, the lead director of the target company plays an especially critical role: *“Whenever a company is approached [with a hostile takeover bid], the board takes control, and the lead director is very important ... If you’re acquiring a company, the CEO [not the lead director] takes primary responsibility for the transaction.”*
- **Experience level of the management team and board.** Members said that the transactional experience of both the management team and the board of directors affect the lead director’s role in a transaction. When the management team or the board has a great deal of experience with major transactions, then the lead director’s role may be more limited. One member stated, *“We had a terrific CEO who understood transactions and the other company’s culture. He naturally took the lead.”* Another member stated, *“There’s no substitute for a great CEO. Making sure you have the right CEO with the right set of experiences [is crucial].”* In multiple conversations to prepare for the meeting, members underscored the importance of the board’s experience with transactions: *“The experience of the board should come into play – management tends to [emphasize] the ease of integrating companies, but directors who are experienced know how difficult this can be.”*

The lead director’s responsibilities during a major transaction

During the meeting, members articulated seven key responsibilities of the lead director during a transaction:

1. Working with the CEO and management team
2. Facilitating discussion among board members
3. Helping the board evaluate a transaction within the company’s strategic framework
4. Determining whether to form a special committee
5. Interacting with external advisers
6. Communicating with shareholders
7. Monitoring the success of a transaction

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1. Working with the CEO and management team

While the lead director advises the CEO and management team periodically throughout the year, the lead director's role as an independent, objective adviser becomes even more critical in a major transaction. LDN members discussed the evidence that the majority of corporate transactions fail to deliver shareholder value. Mark L. Sirower's best-selling book *The Synergy Trap* puts the percentage of corporate transactions that fail to deliver shareholder value at 70%.⁴ One study put that number as high as 83%.⁵ One member observed, *"Not all acquisitions are alike. Some types of acquisitions have a high probability of success, such as those involved in acquiring technology or products, and as lead directors, we need to ensure that management also considers the frameworks of what works and what doesn't."*

Advising the CEO

One member stated, *"I meet once a month with the CEO for breakfast, and we go over all acquisitions and possible opportunities that are coming along. We then present those opportunities to the board."* In some cases, the lead director and CEO work together to determine how best to engage the board throughout the transaction: *"The CEO kept the board actively engaged. We [the lead director and the CEO] needed to engage the full board, not necessarily in transaction negotiations, but in being aware of the opportunity and in surfacing their questions."*

Members cautioned, however, that the lead director must maintain an objective perspective on the transaction: *"You have to keep a certain amount of distance from the CEO – you can't just be buddies. The lead director has to stay objective about the transaction."*

Counterbalancing deal heat and deal fatigue

One member said, *"You have to make sure management doesn't get wrapped up in the deal."* Another member said, *"How do you ensure the process enables the board to say no? We regret so many [deals]."*

In addition, lead directors must also be alert to management's waning interest in the deal due to *"deal fatigue."* In a conversation before the meeting, one member said, *"In companies where there is deal fatigue, the lead director can help ensure that the transaction stays on track and that the proper people are engaged."*

2. Facilitating discussion among board members

Throughout the course of a transaction, the lead director facilitates the board's discussion to ensure all directors' perspectives are heard. In addition, the lead director ensures the board's discussion is informed by adequate due diligence regarding the transaction. Specific steps a lead director can take include:

- **Encouraging open communication between management and the board.** *"The lead director has to do what he can to work with the directors ... and hear their thoughts ... and you get management into the boardroom if necessary [to discuss the transaction]. This was my responsibility ultimately, not the CEO's."*

⁴ Cited in Gregory J. Millman, "Desperately Seeking Synergy," *Financial Executive* 16, no 2 (March 2000).

⁵ "Why 83 Percent of Company Mergers Fail," *Business Wire*, April 14, 2005.

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- **Maintaining the board's focus.** *"From the lead director's perspective, my biggest chore was keeping our group focused, but not so overly focused that we were bogged down in the weeds."*
- **Surfacing board members' objections or concerns.** One member stated, *"It is important for the lead director to force people to listen to the contrarian."* Another member concurred: *"The session of the independent directors is so important – that's when the contrarian can surface his opinion and the board can engage in [more open] thinking."*
- **Ensuring the board engages in proper due diligence.** *"The analysis that we did [of the transaction] was unbelievably thorough, and it made the case so logical and rational. The numbers backed up the need [for the transaction] and were very compelling ... The board had all the information it needed [to make a decision]."*

The lead director's role in a merger of equals

In a merger of equals, lead directors have a unique, expanded set of responsibilities, including:

- **Maintaining social contact between both boards.** *"I would characterize the role of each board as making contact and building a relationship between the two companies ... We also established a very good relationship between the two lead directors from the beginning."* Another member said, *"There's no question that chemistry [in mergers of equals] matters and makes a difference."*
- **Clearly defining the CEO and board's role during the transaction.** *"Each lead director communicated openly with the other, and we both told our CEOs that they needed to negotiate the deal, not us."* Another member elaborated on this point: *"We talked about our roles up front: we [the lead directors] were going to be the impasse breakers, but not the primary negotiators."*
- **Understanding the nuances of each company's culture.** *"My experience with mergers of equals has led me to believe that you really need to understand any given company's culture and dig deeply to find out what will make the transaction work in the long term."*
- **Ensuring the board's focus on the shareholders of the newly formed company.** *"The board's responsibilities change because we are now directors of a newly-created company and have a new set of shareholders."*

3. Helping the board evaluate a transaction within the company's strategic framework

Members outlined the lead director's role in corporate strategy in the November 2008 meeting of the LDN: "Although the development of corporate strategy is primarily management's responsibility, lead directors play a crucial role in ensuring that the board provides appropriate oversight of strategy."⁶ The lead director not only oversees management's development of strategy, but also helps the board evaluate transactions within the framework of that strategy.

⁶ Lead Director Network, "The board's role in corporate strategy," *ViewPoints*, November 24, 2008, 2.

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One member stated, *“Having a strategy and a framework for acquisitions is the only way to do it. If an acquisition doesn’t fit into the framework, that’s a red flag to say, ‘Slow down on this deal and let’s talk about this.’”* Another member agreed: *“If the acquisition doesn’t fit within the four corners of the strategic plan, for me that’s a big concern. It’s also useful to remind your colleagues about how many acquisitions fail, and that should encourage caution. That’s the benefit of involving everybody in the strategic planning process.”*

Some LDN members encouraged boards to look beyond the corporate strategy and to evaluate transactions in context: *“Within a period of making a decision and executing a sale, the market may have changed ... It is not just about strategy; it’s a point in time, and that point of time often changes ... You use your business judgment and bring in the experts.”*

4. Determining whether to form a special committee

In most mergers and acquisitions, corporate and fiduciary laws do not require the board to form a special committee. However, many members reported that they choose to form special committees of the board in advance of a transaction to advise management, inform the board, and respond to any immediate, urgent issues surrounding the transaction.

- **Shepherd the process.** *“The job [of the special committee] was to shepherd the process and report to the CEO and the board on a regular basis. We had no authority to do anything other than help and inform the board.”*
- **Respond quickly.** *“We kept the special committee together because so many things were happening so fast that we couldn’t get everybody together quickly enough. It wouldn’t have been helpful to the CEO to have to discuss every issue with the full board – he needed quick answers.”*
- **Smooth integration.** Some special committees are formed in the aftermath of a significant transaction to ensure the smooth integration of the new board of directors: *“We put together a special committee of legacy board members and new board members, and we met regularly with the CEO for a month and had phone calls with the full board every 10 days.”*

Although the size and membership of the special committee varies by company, members indicated that the lead director is almost always a member of the special committee. One member said, *“The board created a group – [the] chair[s] of the compensation, audit, and governance committee[s] – and we met often.”* Another member said, *“We formed a special committee of a few active directors ... I helped identify those directors.”* One member observed that, due to time requirements, only a small, committed group of directors will ultimately be willing to join the special committee: *“There was some pushback from directors saying, ‘We want to be involved,’ but ... once we explained the time commitment, they no longer wanted to be involved.”*

In addition, some companies form special committees to ensure that they capture the benefits of a transaction once it is completed. One member said, *“We don’t do a special committee before the transaction, but we do one afterwards to ensure we’ve reaped the benefits.”*

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Another member concurred: *“We formed a special committee after the deal went public, and the committee went on for two years to monitor the synergies.”*

5. Interacting with external advisers

In most major transactions, the board retains its own independent advisers: typically a law firm and an investment bank. These external parties offer independent advice to the board of directors on the value and viability of a potential transaction.

In some cases, the lead director oversees the board’s relationship with external advisers, while in other cases the special committee manages the relationship:

- **Lead director oversees the relationship.** *“We used an outside law firm and investment bank, and they reported to me.”*
- **Special committee oversees the relationship.** *“We met with the CEO and board and set up an independent committee of the board. This independent committee hired the independent counsel and lawyer.”*

The lead director must ensure that the independent law firm or investment bank does not unduly influence the board: *“There is a big distinction between adviser and decider. You have to make sure the outside counsel isn’t pushing the board too hard in one direction.”* Another member said, *“Part of the board’s responsibility when working with outside advisers is managing their perspective. You can’t let their opinion singlehandedly derail a deal.”*

6. Communicating with shareholders

LDN members agree that the CEO should be the company’s representative when speaking to the shareholders during a transaction. However, in some cases, such as highly publicized or controversial transactions, lead directors may have an important role in reaching out directly to the shareholders: *“I met with some of our largest shareholders [during a transaction] to say, ‘Here’s our process, and here’s our perspective on shareholder value ... and strategic and financial value.’”* Moreover, in certain high-profile mergers or acquisitions, shareholders may pressure the lead director to comment on the transaction: *“If you think you’re going to get out of the shareholder communication – you can’t. They called me at home. You just have to be sure you know what you want to say.”*

The lead director may choose to reach out directly to shareholders if management requests the lead director to do so or if a shareholder requests a meeting with the lead director. In a conversation prior to the meeting, one member said, *“If a specific shareholder is concerned about a transaction, then the lead director can speak to them. But I wouldn’t just volunteer to do it.”* Speaking prior to the meeting, another member elaborated: *“If management asks the lead director to speak to an external constituency, that’s fine, but the bigger question is, should any lead director go out to meet with external shareholders without management present? External communication is probably not something the lead director or board should seek to do.”*

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7. Monitoring the success of a transaction

The lead director plays a central role in ensuring that the board devotes adequate attention to monitoring a completed transaction. At certain companies, major transactions are reviewed periodically throughout the year in executive sessions or board meetings in order to review the benefits that the company hoped to achieve and consider whether these benefits are being realized: “[*The aftermath of a transaction*] is always a part of our agenda.”

One member described a company’s practice of monitoring the transaction on an annual basis with the full board: “*Once a year, we’ll go back to look at acquisitions and review the transactions so that we have an honest scorecard.*” Another director reported a similar practice: “*Once a year, we go back [and look at] five years’ [worth of data] to look at the results.*”

Conclusion

Members are keenly aware that most major corporate transactions fail to produce the benefits sought by the acquiring company. One member characterized major transactions as “*mistakes waiting to happen.*” In this context, the lead director must ensure that management and boards pay attention to the nature of the deals in front of them, that directors with contrarian views are heard, and that post-transaction integration occurs successfully. According to one member, executing a major transaction without a lead director was “*a bloody disaster.*” Regarding oversight of major transactions, one member said, “*This is one of the most important jobs [lead directors] have.*”

About this document

ViewPoints is produced by Tapestry Networks to stimulate timely, substantive board discussions about the issues confronting lead directors. The ultimate value of *ViewPoints* lies in its power to help all constituencies develop their own informed points of view on these important issues. Anyone who receives *ViewPoints* is encouraged to share it with those in their own companies and with their colleagues at other companies. The more board members, members of management, and advisers who become systematically engaged in this dialogue, the more value will be created for all.

The Lead Director Network (“LDN”) is sponsored by King & Spalding and convened by Tapestry Networks. The LDN is a group of lead independent directors, presiding directors, and non-executive chairmen drawn from America’s leading corporations who are committed to improving the performance of their companies and to earning the trust of their shareholders through more effective board leadership. The views expressed in this document do not constitute the advice of network members, their companies, King & Spalding, or Tapestry Networks.

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