SUMMARY

NO-SHOPS: BOARD RECOMMENDATIONS AND MATCHING RIGHTS

No-shops: Board Recommendations and Matching Rights

- Public M&A agreements require that the target's board recommend that its shareholders vote in favor of the deal.
    - The board's fiduciary duties also require that it maintain the ability to change its recommendation until the shareholders approve the transaction.
    - That's why the deal-protection framework contains fiduciary-out exceptions. Under these exceptions:
        - The target board can change its recommendation; and
        - Terminate the existing deal to take a topping bid any time before the shareholders approve the existing deal.

Change in Board Recommendation

- Usually, for the target board to change its recommendation, it must:
    - Determine, in good faith, after consulting with its outside legal and financial advisors, that continuing to recommend the transaction would be inconsistent with its fiduciary duties.
- Most deals also require that the board conclude that the new deal is a Superior Proposal (and not one that could or would be).
    - The reason for this higher standard is that, at this stage:
        - The new bidder should have had an opportunity to review the diligence, negotiate with the target, and make a binding bid.
    - This lets the target board make a more definitive assessment than during the earlier stages of the deal.
- The typical Superior Proposal formulation requires that the new proposal be:
    - For a minimum amount of the target's stock or assets (usually at least 50%);
    - More favorable to the target's stockholders from a financial point of view than the existing deal (when taking into account all relevant considerations, including timing, regulatory conditions, and deal certainty); and
    - Occasionally, there is an absolute, rather than a comparative, requirement.
        - For example, that the new deal be reasonably likely to be completed or that it has financing (if it's a cash deal).

Matching Rights

- Before a board can change its recommendation for a Superior Proposal, the initial buyer generally has 3 to 5 business days after the board's determination to match the new terms.
    - If the competing bidder amends its proposal, the initial buyer has subsequent, shorter match periods. In other words:

        - Before a target board can take action that might destroy the original deal, it agrees to give the original bidder a chance to propose a revised (and better) deal; and
        - The Superior Proposal determination must include any such revised terms.

Intervening Events

- In some deals, the parties also set out the target's right to change the board recommendation based on an Intervening Event.
    - Intervening Event is often defined as something significant that occurs after the signing of the deal that wasn't known or, sometimes, also wasn't reasonably foreseeable, at the time of signing.
        - The idea is that a target board can change its recommendation but shouldn't be able to simply change its mind about what it already knew at signing.
        - A common example is "discovering gold under the target's headquarters."
            - It's more likely that some other positive development for the target makes the original deal no longer justifiable—such as FDA approval for a biotech company.
- The parties will also often negotiate exceptions to the definition of Intervening Event.
    - These exceptions clarify instances when the target board does not have the right to change its recommendations. For example:
        - They might exclude adverse developments at the buyer in a stock-for-stock deal.
            - The theory is that other provisions protect the target for those events, like the "no Material Adverse Effect" condition.

This course also includes interview footage with Jenny Hochenberg from Freshfields Bruckhaus Deringer and Igor Kirman from Wachtell, Lipton, Rosen & Katz.