

# AN EXPERT'S VIEW



**Eduardo Gallardo**  
PARTNER  
GIBSON, DUNN & CRUTCHER LLP

*Eduardo is a partner in the firm's New York office. He focuses his practice on mergers and acquisitions and has extensive experience representing public and private acquirors and targets in connection with mergers, acquisitions and takeovers, both negotiated and contested.*

Eduardo shares his thoughts on trends and developments in public M&A deals:

## **Of the deals you have worked on this year, have you noticed any interesting trends or developments?**

Market statistics show that global and US M&A activity was down during the first half of this year, as compared to the same period in 2011. I believe this trend is not likely to reverse itself in any significant manner until broader economic and political uncertainties in the US, Europe and China are resolved.

On the positive side, acquisition financing is currently generally available to creditworthy issuers on attractive terms due to historically low interest rates, which is encouraging a healthier level of discussion among private equity firms and public targets around potential LBO transactions. But LBO activity remains well below the size and volume of deals witnessed during the 2005 to 2007 period. We are also seeing an increase in the number of spin-offs and other forms of strategic divestiture transactions by large corporate players.

In terms of the public M&A markets, I think boards have become increasingly sensitive about the public perception of their actions and are in general less willing to take risks — no action is oftentimes perceived as the better alternative. This is probably due in part to an increased level of scrutiny of M&A transactions, particularly private equity buyouts, by shareholder groups and the courts, as well as the broader political climate.

This general trend in board attitude towards risk-taking puts additional pressure on overall deal activity and is reflected in the specific contractual terms of many recent public transactions. For example, there continues to be an uptrend in the use of go-shops even in situations where, from a legal perspective, the board may have reasonably concluded in the past that a more traditional post-signing no-shop with limited fiduciary outs was appropriate. Also, even though go-shops have traditionally been used in the context of private equity buyouts, in a few instances over the last few months we have seen go-shops used in deals with strategic buyers, possibly where the target board felt that doing so would better insulate it from potential second-guessing.

## **Have you noticed any trends in M&A activity overall?**

During the first half of 2012, we have seen a number of significant unsolicited M&A offers that have been publicly announced,

including GlaxoSmithKline's offer to acquire Human Genome Sciences, Coty's bid for Avon and Roche's offer for Illumina. This activity is encouraged, in part, by the continuing pressure on public valuations, as well as the significant cash held on the balance sheet of many strategic would-be acquirors.

Beyond the publicly announced large hostiles, I think that acquirors (both strategic and private equity) are increasingly prepared and willing to submit unsolicited private bids for public targets, and take affirmative steps to raise the prospects of launching a public takeover bid in order to pressure a target board into entering into friendly private sale discussions. In this environment, boards need to be very much cognizant at all times of their industry landscape, long-term prospects, potential acquirors and takeover defense vulnerabilities.

Growing pressure from Institutional Shareholder Services (ISS) and corporate governance groups has resulted in the weakening of traditional takeover defenses over the last few years, as more public companies have decided to terminate rights plans and de-stagger boards. Pressure is now mounting to give stockholders the right to call special meetings and act by written consent. The cumulative effect of these changes is to make public companies increasingly vulnerable to hostile takeovers.

## **Apart from acquisition activity, have you noticed any other significant developments impacting M&A practice recently?**

There have been a series of well-publicized proxy fights this year. We have noticed an increasing recognition by boards that early engagement with the activist is often more productive and conducive to a positive outcome than ignoring early signs of potential activism. In general, boards and management are more prepared than they were in the past to sit down with a potential dissident and have a dialogue to seek common ground, to avoid a disruptive and expensive proxy battle. As a result of this, we are seeing a significant number of activist situations getting resolved at an early stage, even before the activist gives any public signal of its intent to launch a campaign.

However, we do continue to see many instances where such a path is not viable given the deep disconnect between the incumbent board and the dissident. Interestingly, we have also seen in the last year a number of large cap companies that have been the subject of activist campaigns, while in the past that activity had typically been limited to middle market and small cap companies.