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Dealmakers Q&A: Gibson Dunn's Stephen Glover

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Stephen Glover

Glover is a member of the D.C. Bar Board of Governors. He was named the 2014 Washington, D.C., M&A Lawyer of the Year by The Best Lawyers in America and has been ranked in the top tier of corporate transactions attorneys in Washington for the past 10 years (2005-2014) by Chambers USA America's Leading Business Lawyers. He also has been recognized as a BTI Client Service All-Star.

As a participant in Law360's Q&A series with dealmaking movers and shakers, Stephen Glover shared his perspective on five questions:

Q: What's the most challenging deal you've worked on, and why?

A: Every deal has its unique challenges. Sometimes, the issues are economic. For example, you may have to think about ways to close an apparently unbridgeable gap between what the buyer is willing to pay and what the seller is willing to accept. Sometimes, the tough issues relate to personalities. How do you deal with a difficult, stubborn seller? How do you advise a buyer that is too eager or too inexperienced? How do you negotiate with an opposing lawyer who is imperious and unreasonable? In other situations, the complicated issues are legal. For example, can you overcome a challenge by the antitrust regulators? Can you solve disclosure issues in a deal involving the issuance of complex securities? The fact that virtually every deal presents tough issues is part of what makes transaction work so interesting.

Although every deal is unique, there are a few that stand out. Several years ago, I represented Watson Wyatt in its approximately $3.5 billion merger of equals with Towers Perrin, which resulted in the creation of Towers Watson. The parties were focused on ensuring that the Watson Wyatt and Towers Perrin equity holders each received exactly 50 percent of the equity in the combined company. Achieving this goal was complicated because Towers Perrin was a privately held company with a relatively complex capital structure. The parties were also focused on preserving both companies' management teams and identifying a well-balanced group of directors for the post-merger company.

The parties were able to solve these problems, but the solutions took time to develop.

Another interesting transaction was the 2011 spinoff by Marriott International of its time-share business, now known as Marriott Vacations Worldwide. Although the transaction was not, strictly speaking, an M&A deal, it presented many of the issues that lawyers see in a carveout deal, since the company's time-share business was well integrated with its hotel business. The parties needed to enter into a long-term license giving Marriott Vacations Worldwide the right to continue to use the Marriott name after closing; the parties also needed to develop contracts governing a variety of other aspects of their ongoing business relationship. Negotiating and documenting these, and then describing them in the SEC filings presented significant challenges.

Q: What aspects of regulation affecting your practice are in need of reform, and why?

A: One relatively obvious area where thoughtful reform would be appropriate is the U.S. corporate tax rate structure. For months, the press has been full of reports about U.S. companies that are combining with companies located in low-tax jurisdictions so that they can move their headquarters out of the United States and take advantage of much lower foreign corporate tax rates. Lawyers, investment bankers and tax advisers have been spending lots of time talking with their clients about the possibilities of engaging in one of these so-called inversion transactions. Some very large hostile deals have been motivated by this goal. For example, Pfizer's approximately $120 billion offer to acquire AstraZeneca, now withdrawn, is reported to have been driven in part by tax planning. Drug company Abbvie's recently announced $50 billion offer for Irish company Shire may also reflect tax planning efforts.

The companies that have announced inversion transactions have been criticized as unpatriotic by politicians and the domestic press. But the managers of these companies are engaging in rational economic behavior. They can save many millions of dollars by sheltering income from U.S. corporate tax rates. Moreover, a respectable argument can be made that from a fiduciary perspective, they are doing exactly what they should — they are looking for ways to protect and promote their stockholders' interests.

Sen. Levin and others have been promoting legislation that would make inversions much more difficult. The Treasury Department has recently suggested not only that anti-inversion legislation should be adopted, but also that any change in law should be retroactive. The White House has indicated that it is considering whether it can make regulatory changes that would have the effect of banning inversion transactions even if legislation is not adopted. These efforts may not be successful — but even if they are not, they are likely to have a chilling effect on inversion transactions over the next few months.

Some commentators have suggested that rather than make temporary fixes, Congress and the executive branch should undertake a complete overhaul of the corporate tax system. Changing the corporate tax system is difficult, however, and it seems unlikely that a major overhaul could be accomplished in the near term. One thing I am certain about, however, is that over time the pressure for a solution is only going to increase.

Q: What upcoming trends or under-the-radar areas of deal activity do you anticipate, and why?

A: One trend that has already surfaced is the role that activists are playing in M&A transactions. Activists now have very large sums of money at their disposal — by some estimates, more than $100 billion has been invested in activist funds. In the past, corporate boards and their advisers have assumed that activists do not focus on opportunities to participate in change-of-control transactions. Increasingly,

however, we have seen activists take positions in companies that have announced transactions, with the goal of forcing the buyer to pay a better price. Indeed, some observers have speculated that merger activity was relatively low in 2013 in part because this threat of activist interference had a chilling effect on companies' willingness to do transactions.

In addition, we are now seeing activists participate directly in hostile bids. Most prominently, Valeant has combined forces with Bill Ackman's Pershing Square fund in its approximately $50 billion offer for Allergan. Observers speculate that Valeant teamed with Ackman so that it could make a more muscular and effective bid than it would be able to make on its own. It remains to be seen whether this tactic becomes commonplace. If it does, however, we can expect to see more extended takeover battles.

The possibility that activist funds will play an increasing role in M&A transactions may increase pressure for regulation. Attention is already being paid to the question whether the rules governing the reporting of investment positions on Form 13D should be made more demanding. That debate is likely to become more intense. More generally, if activist funds become frequent players in the M&A marketplace, the debate among academics, judges, investors, companies and advisers regarding short-term vs. long-term investing is likely to become more fierce. Market observers are likely to pose more sharply the questions of whether activist focus on short-term returns, as it manifests itself in the M&A marketplace, is helpful or destructive. That debate, in turn, may drive further discussion about regulatory reform.

Q: What advice would you give an aspiring dealmaker?

A: I would tell an aspiring dealmaker to get as much experience as possible actually leading deals. For obvious reasons, achieving this goal may be easier said than done — leadership roles in M&A transactions are in short supply, and clients generally want their most experienced advisers to play this role. But managing input from all of the deal participants, using this input to develop deal structures and negotiating strategies, and successfully pushing the deal forward to completion are skills that dealmakers develop only when they have repeated practice.

Lawyers who have lots of experience actually leading deals are much more likely to be able to see the whole forest and not just the trees. They are much more likely to be in a position to give advice on the most important issues in the deal — to become true partners to their clients. That works much better for the clients, and is also much more satisfying for the lawyers.

If aspiring dealmakers cannot find opportunities to lead deals, then they should take advantage of opportunities to lead pieces of transactions. For example, if they are running the diligence process, they should take ownership of the process. They should think independently about how to produce work product that is useful to the client and the other advisers. They should also think about how any problems they are uncovering should shape the deal strategy. If they do that, and effectively communicate with the transaction leaders, they are much more likely to get leadership roles in the future.

Q: Outside your firm, name a dealmaker who has impressed you, and tell us why.

A: This is a tough question. Over the years, I have been impressed by lots of people in many different ways. Even though I have been practicing law for more than 30 years, I still learn by watching other lawyers and advisers. It is always instructive to see how they solve deal-related problems.

The result is that if I were to make a list of people I've learned from or tried to emulate, the list would be very long. I can name a few people, but the list is inevitably incomplete. Jerry Shulman, a corporate partner at Williams & Connolly, was one of the first people I learned from as an associate. His ability to identify issues and his creative approach to problem solving made a big impression on me. Richard Steinwurtzel, who is a former partner of mine from the days when I was at Fried Frank, taught me the importance of persistence in negotiating, and reminded me to retain my focus on the issues that the client most cared about. I've worked with George Stamas atKirkland & Ellis on a few transactions. He knows the law, but he is also able to take charge of a room, and uses a combination of charm and willpower to move people in the right direction and make things happen.

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