

# Unsolicited Offers and the Power to Remain Independent

## WRITTEN BY

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With stock prices generally down in the current bearish market, financial institutions may see an increase in unsolicited acquisition offers. Fortunately, well-prepared boards that fulfill their fiduciary duties should be able to safely conclude that their institution should remain independent.

When a company receives a *bona fide* unsolicited written bid – whether ostensibly friendly or more overtly hostile – management must inform its board of directors and the board must consider the merits of the offer and respond in an informed manner. The board's fiduciary requirements have a number of important implications:

- Waiting until an unsolicited offer is received puts the board at a substantial disadvantage. Boards and their institutions can take actions in advance of receiving an offer to improve their ability to deal with an unsolicited bid, including maintaining and periodically reviewing a strategic plan for long-term success, establishing “on the shelf” anti-takeover defenses, and maintaining a plan for assessing and responding to unsolicited offers.
- Assessing an unsolicited offer will require the board to become reasonably informed as to the merits of the bid relative to the company's long-term prospects as an independent entity. To do so, the company should engage an independent financial advisor and legal counsel, and the board should also seek input from management. A proper assessment will not occur overnight but should not be unduly delayed. The board should be kept informed and up to date with respect to any developments while gathering information from management and the company's advisors and carefully considering the proposal and the appropriate response.
- The board, along with legal counsel, should consider possible conflicts of interest on the board. This could include non-independent board members whose employment might be impacted by the completion of a sale transaction. Depending on the nature of any conflicts, it may be appropriate for decisions to be made by a special committee of non-conflicted board members, though the views of excluded directors could be considered as long as the rest of the board is informed of the conflict.
- Depending on the nature of the bidder and the Board's intended response, the company may also wish to engage a public relations advisor and/or a proxy solicitor. Unsolicited offers can include overt or veiled threats of making the offer publicly known if the target

is unwilling to negotiate and it is important to be ready in case the process goes in that direction. In such cases, it is important that communications regarding the offer and the company's evaluation and response are carefully managed and consistent.

While the specific nature of the board's fiduciary duties and the requirements for the protection of the business judgement rule may vary somewhat from state to state, in general courts will be reluctant to second-guess a board's decision where the board (or special committee) is free from conflict, has become reasonably informed with respect to the financial, legal and other merits of the offer and the company's standalone prospects, and otherwise acts in good faith in accordance with a reasonable process. These important touchstones should be

memorialized in the minutes of board meetings and related documentation in connection with the evaluation of and response to the unsolicited offer. Legal counsel can provide guidance regarding both substance and procedure with respect to an institution's particular jurisdiction of incorporation.

Ultimately, boards can take comfort in their ability to resist unsolicited acquisition proposals where they properly exercise their fiduciary duties and business judgment to conclude that the company's stockholders will be better off if the company remains independent to execute on its long-term strategy. While unsolicited offers are not to be taken lightly and ultimately could lead to a company's sale, it is worth remembering the views of the Delaware Court of Chancery in its important decision upholding the use of poison pills to resist hostile tender offers. Asking itself who gets to decide when and if a corporation is for sale, the court concluded that the power ultimately lies with the board of directors.[1]

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[1] *Air Products and Chemicals, Inc., v. Airgas, Inc.*, C.A. No. 5249 (Del. Ch. Feb 15, 2011).

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