



REIT M&A: Use and Overuse of Special Committees

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Special committees are often an indispensable tool in conflict transactions. In REIT management-buyout transactions, a well-functioning and well-advised committee can sometimes shield directors and managers from after-the-fact litigation exposure. But special committees are not one-size-fits-all, and can also be deployed to the detriment of a company and its shareholders. Forming a special committee when not required can needlessly hamper the operations of the company and its ability to transact, create rifts in the board and between the board and management, and burden the company with an inefficient decision-making structure that may be difficult to unwind. It is important, therefore, for REITs to carefully consider—when the specter of a real or potential conflict arises—whether a special committee is in fact the best approach, whether it is required at all, and whether recusal of conflicted directors or other safeguards are perhaps the better approach.

REIT management teams often stay the course through an M&A transaction and remain employed by the successor company after the deal. In such cases, it is not unusual for management to negotiate terms of employment with the transaction counterparty at some point during the deal, preferably towards the end when all material deal terms have been agreed. But while such negotiations can raise conflict issues, they do not necessarily mean that the entire transaction and surrounding process must or should be negotiated by a special committee. In many cases, simple recusal or other procedural safeguards may be more appropriate to address employment negotiations—leaving the full board to address matters for which there are no conflicts.

Where a special committee is properly deployed, the committee should exclude anyone with a direct or indirect interest in the transaction, and the committee should engage its own unconflicted legal and financial advisors. The committee should also be provided full negotiating power, including the power to reject any transaction. It should be constituted early in the process, before any material transaction terms are agreed, and have access to all relevant material information regarding the company and the proposed transaction.

Special committees should not be confused with transaction committees. Such committees are typically established for efficiency, not to deal with conflicts. Transaction committees can be particularly helpful when a deal is moving fast and requires a level of attention and speed that is impractical to expect from the full board. Transaction committees can—and often do—properly include the CEO and other management directors, and it is usually expected and required that material decisions will come back to the full board for final determination.