Harvard Law School Forum on Corporate Governance

As Strategic Financial Institutions Mergers Thrive, Lessons from the Boston Private Merger Proxy Contest

Posted by Edward D. Herlihy and Jacob A. Kling, Wachtell, Lipton, Rosen & Katz, on Friday, May 7, 2021

Tags: Banks, Boards of Directors, Financial institutions, Mergers & acquisitions, Shareholder activism, Shareholder voting
More from: Edward Herlihy, Jacob Kling, Wachtell Lipton

Editor's Note: Edward D. Herlihy and **Jacob A. Kling** are partners at Wachtell, Lipton, Rosen & Katz. This post is based on their Wachtell memorandum. Related research from the Program on Corporate Governance includes **The Long-Term Effects of Hedge Fund Activism** by Lucian Bebchuk, Alon Brav, and Wei Jiang (discussed on the Forum **here**); **Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System** by Leo E. Strine, Jr. (discussed on the Forum **here**); **The New Look of Deal Protection** by Fernan Restrepo and Guhan Subramanian (discussed on the Forum **here**).

The past several months have seen a significant surge in strategic bank mergers. Having shored up their balance sheets through well-timed capital raises, conservative capital management and reserves taken during the depths of the Covid-19 pandemic, many banks and financial institutions have emerged in a position of strength, and are once again looking to strategic M&A to create synergies, drive scale efficiencies to support investment in technology, and generate long-term value for their companies and stakeholders. After a moratorium on deal activity through the middle of 2020, we are now in the middle of a wave of bank consolidation which began with PNC's $11.6 billion cash acquisition of BBVA's U.S. banking business announced in November 2020, followed shortly thereafter by Huntington Bancshares' $22 billion all-stock strategic merger with TCF Financial in December to create a top 10 U.S. regional bank. Merger activity has continued through the early months of 2021 and has shown no signs of abating, with a number of transformative strategic combinations announced over the past few weeks alone, including Independent Bank Corp.'s $1.15 billion all-stock acquisition of Meridian Bancorp, BancorpSouth and Cadence Bancorporation's $6 billion all-stock merger of equals, and Webster Financial's $10.3 billion all-stock merger of equals with Sterling Bancorp. These combinations illustrate the increasing importance of scale and accelerating digital and technological investment and the significant synergies and value creation that a well-planned and executed strategic merger can create for shareholders and other constituencies on both sides of a transaction.

One of these transactions—the first major bank merger announced in 2021—is Boston Private Financial Holdings' pending merger with SVB Financial Group. The Boston Private/SVB Financial merger became the target of a vicious months' long proxy fight by activist hedge fund HoldCo Asset Management in an attempt to block the deal. Yesterday, the shareholders of Boston Private resoundingly rejected HoldCo's efforts and voted to approve the merger at the company's special meeting, surpassing by a wide margin the two-thirds of the outstanding shares approval threshold required under Massachusetts law. The vote marked an emphatic reaffirmation of the compelling and value-maximizing strategic combination negotiated by the Boston Private board of directors (the "Board") and management team, with 72% of the outstanding shares voting in favor of the deal based on the preliminary vote report, representing an overwhelming 89% of the votes cast (95%, excluding HoldCo's own shares).

It is especially odd that the Boston Private/SVB Financial merger in particular could become the target for such strong attacks. Across any number of measures, the deal was a home run for the company and shareholders. At announcement, the merger consideration represented the second-highest premium in any major bank deal in the last three years, and the single highest price to forward earnings-per-share multiple. As a result of the significant appreciation in the value of SVB

Financial's stock after signing, and most of the merger consideration coming in the form of stock at a fixed exchange ratio, by the time of the shareholder vote the implied premium to Boston Private's unaffected pre-signing share price had skyrocketed to 78%. The Boston Private Board ran a thorough, robust and deliberate process, extracting multiple price increases from SVB Financial over a number of months, and carefully analyzed the benefits and risks of the merger in comparison to Boston Private's strategic alternatives, including its standalone plan and the universe of other potential strategic partners. None of that deterred HoldCo from waging an aggressive proxy fight to try to block the deal or, alternatively, hold it up in an effort to extract a price bump from SVB Financial.

The Boston Private proxy contest underscores that no deal is entirely immune from opposition by an activist investor pursuing its own agenda or trying to elicit a price increase from the buyer, even absent any realistic prospect of a better deal coming along or any other viable strategic alternative to create superior long-term value. But it also reveals a number of missteps by HoldCo, and offers useful lessons for companies responding to deal activism. The transaction's ultimate victory at the polls confirms that well-constructed strategic mergers that reflect sound industrial logic, strong financial metrics and a thoughtful and well-run board process can and will withstand activist scrutiny.

Overview of HoldCo and the Boston Private Merger Proxy Fight

During the Summer and Fall of 2020, while Boston Private was in the early stages of discussing a potential strategic transaction with SVB Financial, HoldCo was quietly accumulating a 4.9% stake in Boston Private. At HoldCo's request, Boston Private management met with the principals of HoldCo three times during this period. The meetings were cordial, but behind the scenes HoldCo was plotting to launch a proxy contest to seize control of the Boston Private Board and change the company's strategic direction by undertaking aggressive cost-cutting

measures, abandoning the company's plan to grow its wealth management business, and ultimately pursuing a sale of the company. When Boston Private announced the SVB Financial merger in January, HoldCo was taken by surprise. It immediately put out a previously prepared deck the morning after the merger was announced, attacking the Boston Private Board and management team and reflexively opposing the transaction. Without engaging with the merits of the deal in any detail, HoldCo asserted that the price was inadequate and that other bidders would pay substantially more for the company, and chastised the Boston Private Board for not running a broad auction process. Boston Private had not yet put pen to paper on its preliminary proxy statement, but that did not stop HoldCo from hurling a series of speculative criticisms at the Board and its assumed process in arriving at a deal with SVB Financial. Several weeks later, HoldCo nominated a majority slate of five directors, none of whom had any discernible operational banking experience, for election to Boston Private's nine-person Board at its next annual meeting, and separately announced that it would be soliciting proxies from Boston Private shareholders to vote against the merger.

HoldCo had a prior history of shorting bank stocks and investing in recapitalizations of failed banks during and following the financial crisis, but until the Boston Private contest had not publicly campaigned against a major financial institution. HoldCo now purports to have over $1 billion in assets under management, and in the past year has accumulated positions in a number of publicly traded banks and financial institutions, including Boston Private and Berkshire Hills Bancorp, another Boston-based bank holding company that HoldCo targeted in parallel with its attack against Boston Private, initially nominating a majority slate to the Berkshire Hills board of directors and ultimately agreeing to a settlement whereby Berkshire Hills appointed one of HoldCo's co-founders and an additional director approved by HoldCo to its board. In the end, HoldCo did not get that lucky with Boston Private.

Lessons from the Boston Private Merger Proxy Fight

Well-Constructed Strategic Mergers Can and Will Withstand Activist Scrutiny.

Among financial institutions, the most significant and best received strategic public company merger transactions have always been all or mostly stock mergers that exhibit collaborative partnership approaches not only to pricing but also other key contractual terms. Stock at a fixed exchange ratio typically constitutes a significant component of the consideration, allowing shareholders of both institutions to share in the synergies and long-term value creation from the combination and the upside potential in the acquiror's share price. These mergers often include a combined board and/or management team that draws from both institutions, allowing the combined organization to benefit by leveraging the strengths of both parties' management teams, systems and technology.

Each of the significant bank mergers of 2021 has these features, and the Boston Private/SVB Financial transaction is no exception. The strategic merits of the combination are self-evident—the merger gives Boston Private critical access to SVB Financial's expansive client network and position at the center of the innovation economy to enhance Boston Private's wealth management platforms, and allows the combined company to leverage its scale and financial capabilities to make additional investments in innovation and technology to deliver an improved experience for Boston Private clients. The transaction draws on the strengths of both management teams, with Boston Private's Chief Executive Officer and SVB Financial's current head of Private Banking and Wealth Advisory together leading the combined company's private banking and wealth management businesses.

The Boston Private/SVB Financial merger is also financially compelling. The deal price at signing represented the second-highest premium in any major bank deal in the last three years, at roughly 30%, and the highest price to forward earnings-per-share multiple. But more importantly from a value creation perspective, the parties agreed on a predominantly stock transaction (roughly 80% of the consideration at signing was stock) at a fixed exchange ratio, without collars or other unusual features. This was a key deal term for Boston Private. The Boston Private Board believed at the time the transaction was signed that there was significant upside potential in the value of SVB Financial's stock based on the company's continued strong performance, and that it was important to lock in a fixed exchange ratio in order to capture that upside for shareholders.

The Board was right. SVB Financial's stock soared as it continued to outperform market expectations and analyst consensus estimates through the fourth quarter of 2020 and the first quarter of 2021. SVB Financial's strong first quarter results, which topped analyst consensus EPS estimates by more than 50%, helped boost its stock price by almost 9% in a single trading day shortly ahead of the Boston Private shareholder vote. Because the exchange ratio was fixed at signing, this appreciation in the value of the stock consideration generated hundreds of millions of dollars in incremental value for Boston Private's shareholders above and beyond the significant premium already embedded in the deal value at signing. The significant value creation for Boston Private shareholders underscores that in strategic merger transactions with a significant stock component, the spot premium at signing is usually less important from a long-term value perspective than the underlying strategic merits of the combination and the board's qualitative assessment of the prospects of its merger partner and the strength of its stock as acquisition currency. SVB Financial's continued strong performance post-signing reaffirmed the Boston Private Board's assessment that it had chosen the right partner and that it was taking valuable currency in the form of SVB Financial shares, and served as a strong rebuttal to HoldCo's claim that the merger consideration undervalued Boston Private.

Strong and Mutual Contracts Are Appropriate in Strategic Mergers.

A key element of successful stock-for-stock mergers is mutual commitment to the transaction by both parties at signing, reflected in a merger agreement with limited conditionality designed to create a high likelihood of completion. Walk-away provisions, collars or hair-trigger conditions or termination rights for either party are fundamentally inconsistent with a fixed exchange ratio partnership and create inappropriate deal uncertainty and often unanticipated consequences that can be disastrous for both institutions. Banks and other regulated financial institutions have many key stakeholders, including shareholders, employees, customers and communities, who are impacted by a merger announcement. A failed deal can have serious consequences for both parties as well as each of these key constituencies, through value destruction, wasted resources, opportunity cost, reputational damage, and potential for significant employee and customer attrition, among others.

The Boston Private/SVB Financial merger agreement was struck on customary terms, similar to other significant strategic bank mergers of the past several years. This included a strong commitment from both parties to seek regulatory approvals for the transaction and from Boston Private to seek shareholder approval, with limited and appropriate closing conditions. The Boston Private Board retained the ability to change its recommendation of the merger to shareholders in the event its fiduciary duties required it to do so, but at no point did the Board waver in its belief in the compelling strategic and financial benefits of the merger. The mutual commitment by both parties to seeing the transaction through on the agreed terms and to transparently articulating the benefits of the combination to shareholders was critical to successfully obtaining the vote.

Implement the Right Process and Document It.

The most successful strategic combinations are the result of thoughtful and effective board processes. Well-functioning and well-advised boards understand the company's available alternatives and evaluate a potential strategic merger transaction through a lens that considers the transaction in the context of those alternatives, including management's standalone plan and projections, the universe of potential acquirors or other strategic partners, their suitability and compatibility with the company and their likely willingness and ability to pay. Effective boards get advice early from seasoned financial and legal advisors and, with the help of the management team, carefully analyze the synergies from the transaction, the strategic and cultural fit of the two companies and the results of management's due diligence or reverse due diligence review in order to ultimately make an assessment of the long-term value creation from the potential transaction in comparison to the company's standalone plan and other available options. Boards that follow this process usually end up with transactions that are value accretive and supported by shareholders.

That is exactly what Boston Private and its Board did. In 11 meetings over the course of several months, the Board assessed the company's standalone plan and the opportunities, risks and challenges associated with that plan, and analyzed with its financial advisor the universe of alternative potential strategic merger partners and the several inbound inquiries it received, all at valuations inferior to the SVB Financial transaction. As is the case with many experienced boards, the Boston Private Board was familiar with the strategic merits of those other potential partners, and determined that no potential merger partner would be a better strategic fit or likely offer more favorable terms or stronger prospects for future growth and value creation than SVB Financial.

As importantly, the record reflected the strength of the Boston Private Board's process, which was fully and transparently laid out in detail in the company's proxy statement and supplemental materials provided to shareholders. Ultimately, the Board undertook the right process and made the right decision for the company and its shareholders. That came through in the company's proxy materials and its shareholder engagement efforts, and it resonated with voters.

Auctions Are Not Required and Often Are Not the Right Choice.

HoldCo's repeated refrain throughout its campaign was that Boston Private could have achieved superior financial terms with another bidder had it run a broad and open auction for the company. HoldCo continued to press this narrative notwithstanding that not a single party other than SVB Financial made any actual offer or proposal to acquire Boston Private, either during the negotiation process with SVB Financial or at any time following announcement of the transaction. HoldCo's black-and-white philosophy of how to run a transaction process came across as academic and untethered to the real-world facts on the ground.

Statistically, auction processes are typically not used in stock-for-stock strategic bank mergers, and generally do not produce better results than bilateral negotiations. Over the past three years, a majority of bank mergers above $500 million in value have not involved auction processes. The reasons are clear enough to experienced M&A practitioners: the universe of potential strategic buyers for banks of significant size is limited and well-known to those in the industry and their financial advisors; to the extent that any such potential buyers are interested in a strategic combination, they typically make their interest known proactively; and for a business whose principal assets—its people—walk out the door at the end of every business day, the risks of running a broad auction process and exposing the company to potential leaks, market rumors and resulting employee and customer attrition are real and need to be weighed against the potential and, in many cases, illusory, benefits of running a broad auction process.

There is no single blueprint for how to achieve the best result in selling a company or pursuing a strategic business combination. It is a fact- and context-specific determination that requires qualitative assessments by boards and careful consideration and evaluation of a number of factors that bear on the risks and benefits of approaching additional parties or instead pursuing a transaction with a company that has made a compelling strategic offer, particularly one reaffirmed through due diligence. As a legal matter, boards have significant discretion in designing the process that they believe will produce the best long-term outcome for the company and its shareholders. In the case of Boston Private, the Board determined that the risks of an auction, including the possibility of losing SVB Financial's best and final offer, outweighed any potential benefits, and successfully secured one of the highest premia of any bank merger in years while locking in an exchange ratio at a time that allowed Boston Private shareholders to benefit from the substantial upside potential in SVB Financial's stock price.

Shareholders recognized that the Board ran the right process, and HoldCo's critiques fell on deaf ears.

Reasonable Management Compensation Arrangements Are Appropriate.

In strategic merger transactions, and particularly among financial institutions, a principal source of value is in each firm's human capital, and a key element of the success of a combination and the ability to realize projected synergies is having a combined management team that reflects the best of both companies. In our experience, issues surrounding compensation and retention of management are often of critical importance to the success of a strategic merger and the future stability and strength of the combined Reasonable compensation arrangements for continuing target executives are entirely appropriate, as are well-designed retention programs, which can mitigate the potentially disruptive impact of a deal on critical personnel.

In attacking the Boston Private transaction, HoldCo attempted to paint the deal as a conflict-ridden process forced on the Board by management. These criticisms were rightly perceived by shareholders for what they were—a smokescreen manufactured to serve HoldCo's own agenda. The actual facts here were no different than in any other well-run strategic transaction process and belied HoldCo's assertions: the deal process was overseen by a majority independent Board, with eight out of nine directors independent; there was no diversion of value from shareholders to management and in fact the process was specifically designed to ensure that the economics of the transaction and other material terms were agreed before any retention or employment arrangements were negotiated on an arm's-length basis between SVB Financial and the Boston Private management team; and the terms of those management agreements were entirely customary, reasonable and appropriate.

The Vote Standard Can Matter and Should Be Factored into the Solicitation Strategy Early On.

An often overlooked but potentially important element of public company mergers is the vote standard required to approve the transaction on the target side, and sometimes on the acquiror side as well. The required vote standard is a function of state corporate law and each company's governing documents. In states like Delaware that only require a majority of the outstanding shares to approve a merger, a well-founded transaction may not face any real jeopardy even if opposed by an activist shareholder.

But, occasionally, mergers require a higher vote under state corporate law, such as two-thirds of the outstanding shares, and some companies impose supermajority voting requirements on mergers and similar transactions through their governing documents.

That was the case in the Boston Private transaction, as Massachusetts' corporations statute imposes a two-thirds vote requirement on mergers. Because the required vote for mergers (both in Massachusetts and in other states) is based on the outstanding shares entitled to vote, rather than the shares that are actually voted at the meeting, a two-thirds vote standard can be a significant barrier to securing shareholder approval simply because a number of shareholders will not vote at all, and the failure to vote has the same effect as a vote against the deal under an outstanding share-based vote standard.

Voter turnout can be a particular issue in a contested situation where many shares are likely to have changed hands after the record date due to increased trading volatility and as a result may not be voted, since the record date owner may no longer have an economic interest in the shares. In addition, a number of shares will move into the hands of short-term-focused merger arb funds whose economic incentives may be very different than those of long-term shareholders. A two-thirds vote standard can put additional pressure on all of these factors.

In the Boston Private/SVB Financial merger, it was the two-thirds vote standard itself— and not anything HoldCo did or said in opposition to the transaction—that was the primary hurdle to getting the deal approved. After the transaction was signed and HoldCo announced its plans to solicit against the deal, a number of shares traded into the hands of merger arbs. Another block of shares were purchased by banks to hedge against swaps and similar derivatives contracts they had written for clients. As a matter of firm policy, many banks will not vote these swap shares at all. This trading activity had the natural effect of depressing voter turnout to some extent, which given the two-thirds of the outstanding vote standard meant that Boston Private needed an exceedingly favorable outcome among those shareholders who did vote in order to secure approval of the merger. Boston Private adjourned its originally scheduled meeting for an additional week to give shareholders more time to vote, and overwhelmingly surpassed the required two-thirds standard at its reconvened meeting, with 72% of the outstanding shares voting in favor of the deal, representing 89% of all votes cast (95%, excluding shares held by HoldCo itself).

In these circumstances, it is important to understand the company's shareholder base as of the record date and whether any of these shareholders are unlikely to vote, either because they have sold out of their position or because the shares may be held in respect of swap positions and may not be voted as a matter of policy. Companies should undertake detailed scenario planning to map out the likely voting outcomes and understand how many and which significant shareholders an activist would need to convince in order to amass a blocking position. Boston Private had strong relationships with its key institutional shareholders and engaged with them proactively to ensure that the supermajority vote standard would not ultimately pose a problem, notwithstanding these headwinds.

Know the Law and Have a Well-Conceived Regulatory Strategy.

HoldCo made key mistakes of law on which Boston Private was able to capitalize during the proxy fight, mistakes that revealed HoldCo's lack of a rational strategy. As noted above, HoldCo engaged in a parallel proxy campaign against Berkshire Hills at the same time that it was soliciting votes against the SVB Financial merger with an announced plan of blocking the deal and then electing a majority slate to take over the Boston Private Board. HoldCo's two co-founders were among its five original nominees to the Boston Private Board. But when one of those co-founders was appointed to the Berkshire Hills board in settlement of that proxy fight, HoldCo was forced to publicly withdraw its nomination notice to Boston Private with respect to its two co-founders to avoid violating long-standing banking law prohibiting director interlocks and related control issues. This setback exposed HoldCo's inexperience in the highly regulated banking industry and in managing and operating banks, and laid bare for shareholders the attendant risks to Boston Private in the event that shareholders were to turn over the keys to the company to HoldCo. The fact that HoldCo consciously decided to forego the possibility of nominating a majority slate that included HoldCo's co-founders in favor of having a single representative on the Berkshire Hills board also signaled a lack of conviction in the strength of its arguments or its likelihood of success against Boston Private, and called into question the coherence of its overall strategy. A minority slate of HoldCo's nominees would have no mechanism to cause Boston Private to pursue another sale process or other strategy even if HoldCo's proxy fight were successful.

HoldCo also failed to engage with the regulatory approval process and timeline that any alternative buyer would need to go through. Even if there were another potential strategic buyer for Boston Private waiting in the wings, that buyer would have to start the regulatory approval process from scratch after termination of the merger agreement, which meant any alternative transaction was not only speculative but might be a year or more away from closing, and Boston Private shareholders would bear considerable risk while they waited for that process to unfold. HoldCo's failure to address or even acknowledge these issues was a major hole in its overall strategy that it never plugged.

The Credibility of Director Nominees Matters.

When an activist's campaign against a pending transaction is coupled with an announced or threatened proxy fight to elect directors, as was the case with HoldCo, shareholders will invariably consider the credibility and experience of the activist's nominees to the board in assessing its overall proposed plan. In contrast to Boston Private's existing directors, none of HoldCo's director nominees had any experience serving as a director or officer of a bank or bank holding Institutional Shareholder Services (ISS) specifically noted the inexperience of HoldCo's director nominees in its report, and their lack of relevant experience further undermined HoldCo's own credibility.

Securing the Support of the Proxy Advisory Firms Can Be Important.

It is well known that ISS and Glass Lewis can be influential voices in proxy contests, with a number of institutional investors inclined to follow their voting recommendations. This is particularly true when approval of a transaction requires a two-thirds or other supermajority vote and the margin for error is slim. In a contested proxy fight, both sides will generally have an opportunity to meet with ISS and Glass Lewis several weeks ahead of the scheduled vote, and advance preparation for those meetings is essential. One or both of ISS or Glass Lewis may feel the need to give some amount of air time to an activist's arguments to make clear that it considered both sides' positions, but what ultimately matters is whether they recommend "FOR" the transaction. Boston Private, with the support of its advisors, carefully prepared for these meetings with ISS and Glass Lewis and had the important advantage of being able to send the company's knowledgeable and experienced Chairman and Chief Executive Officer to attend the meetings. Each of them had significant industry and transactional experience, with Boston Private's Chairman having led Morgan Stanley's M&A department for many years. Both knew the merits of the transaction inside and out and were well positioned to address any questions ISS or Glass Lewis might have. The favorable recommendations from both ISS and Glass Lewis reaffirmed the Board's views of the merits of the combination, and were an important factor in reaching the two-thirds vote threshold.

Activists that Lack a Credible Alternative Are Doomed To Fail.

Cutting through HoldCo's rhetoric and hyperbole, at its essential core HoldCo lacked any credible alternative to the SVB Financial merger to present to Boston Private shareholders. Its various purported valuation analyses came across as shoddy and superficial, including relying on an inapposite merger-of-equals-style contribution analysis that ignored the fundamentally different financial, growth and valuation profiles of Boston Private and SVB Financial, and generated a valuation range higher than any major bank merger in the last 10 years. HoldCo's other analyses were similarly off point, including a "sum of the parts" valuation that omitted restructuring costs, made unrealistic and self-serving synergy assumptions, and ignored the fact that Boston Private's business lines, like those of many banks, are deeply interdependent and a spin-off or split-off of one business would not be a viable option. Ultimately, HoldCo was asking Boston Private shareholders to turn down a compelling deal from SVB Financial to take a flyer on a plan that was simply not credible, and shareholders saw through it.

Decks Are Good; Sometimes Letters Are Better.

So-called "fight letters" are a key part of any proxy contest. Boston Private and HoldCo each published a series of these pointed fight letters making their case to shareholders in the weeks between the mailing of each side's definitive proxy statement and the special meeting. The analysis in these letters is important, and not just from a public relations perspective. Boards have a duty to communicate candidly with shareholders and to ensure that the board's rationale for supporting a merger is clearly and accurately conveyed to shareholders through the company's proxy materials. In the face of what can be misleading and sometimes outlandish claims by an activist trying to derail a transaction, companies and their boards need to set the record straight to ensure that shareholders do not make important voting decisions on the basis of Boston Private's key fight letters took a detailed approach to the transaction and methodically rebutted HoldCo's various claims. They were both analytical and appropriately aggressive. HoldCo's letters tended to be shorter, less substantive and more inflammatory. HoldCo also chose to rely more heavily on presentations attached to short press releases and less so on letters. Boston Private used presentations too—putting out a strong rebuttal deck shortly before its meetings with ISS and Glass Lewis—but not to the exclusion of good old-fashioned fight letters. HoldCo's singular focus on decks to the exclusion of letters was, in our view, a tactical mistake. Decks do not get mailed to shareholders; letters do. A thoughtfully crafted set of fight materials is an important tool in a proxy fight for getting the board's message out to shareholders and the proxy advisory firms, and care should be taken to ensure that these materials—which must be filed with the SEC and are subject to potential review and comment—are accurate and not misleading.

Settling Is Usually Not an Option in Deal Activism.

There has for some time been a trend towards companies settling proxy fights instead of going the distance. In a director proxy contest, the question of whether to entertain settlement discussions, and if so, when, is fact dependent and can be influenced by a number of factors, including the strength of the activist's arguments and director nominees, relations with key shareholders, and the company's performance, among others. Sometimes settlements make good sense and avoid the substantial costs and distraction of a proxy fight, particularly where some of an activist's proposals may gain traction and one or more of its nominees may be well qualified. But there can also be a tendency at times to fold too quickly in the face of modest activist pressure. HoldCo was able to quickly extract a settlement with Berkshire Hills less than a month after going public with its campaign, and appeared emboldened by that victory.

But whatever the arguments for or against settling a particular proxy fight in connection with the election of directors, settling as such is usually not a realistic option in the face of deal activism. A company that is party to a binding merger agreement will not have the unilateral ability to make concessions or change terms to appease an activist even if it wanted to, and every well-crafted merger agreement will require the target company to use reasonable best efforts to obtain shareholder approval and close the deal, subject to fiduciary limitations.

Sometimes an activist's true objective in opposing a pending transaction may be to try to force the buyer to raise its price in order to secure target shareholder approval. This "bumpitrage" strategy may have been what HoldCo was really hoping to achieve with its ill-conceived proxy fight. HoldCo eventually revealed its intentions in this regard during the one-week adjournment of the Boston Private special meeting, when HoldCo issued a public letter to SVB Financial's Chief Executive Officer indicating that it would withdraw its opposition to the merger in exchange for a specified price increase. SVB Financial never changed its position—clearly conveyed to Boston Private during pre-signing deal negotiations—that the agreed-upon merger consideration and exchange ratio represented its best and final offer, and publicly confirmed the same in two press releases during the week leading up to the final vote. Following SVB Financial's public reaffirmation that no price bump would be coming, some merger arb investors holding out hope for a price increase likely realized that their choice was between the compelling SVB Financial deal or HoldCo's highly speculative alternative path and threw their support behind the merger.

Transaction parties and long-term shareholders alike should be wary of opportunistic efforts by short-term activist hedge funds to hold up sound strategic transactions in the hopes of inducing small incremental price increases. These types of tactics can put strategic transactions and real long-term value creation at risk in pursuit of what are usually immaterial price bumps, with potentially serious negative consequences for both institutions and their stakeholders should the deal fail. If the transaction does fall through, there may not be another suitable buyer to step up, and even if there is, its closing timeline is likely to be substantially delayed due to the need to restart the regulatory approval process. In the meantime, the value of the franchise may be put at considerable risk. As the Boston Private experience illustrates, when an acquiror credibly communicates to the market that it has no intention of raising its price, even merger arbs are ultimately unlikely to gamble away a financially attractive deal.

Be Prepared and Stay Engaged Until the End.

It is critical for companies and boards to be well advised and prepared for a potential activist attack against an announced deal. These attacks do not come every day, but when they do, advance preparation and careful planning can make the difference between winning and losing the vote. Equally important is staying engaged throughout the contest. Proxy fights require intense focus and commitment from companies and boards at the most senior levels. They take time and resources, and can be distracting and at times even exhausting. But in the context of activist opposition to a transaction that the board has determined to be in the best interests of the company and its shareholders and other constituencies, it is hard to think of a more important task for fiduciaries than ensuring that shareholders have the benefit of accurate and complete information behind the board's recommendation before they Boston Private's Board and management team remained fully engaged throughout the proxy fight, and through that engagement were able to demonstrate to shareholders the compelling combination that the Board and management had negotiated and why it represented the value-maximizing choice for the company. In the end, that was the key to achieving a successful outcome, and the right one for the company and all of its stakeholders.
