Third Offer is a Charm: The Bayer/Monsanto Merger

In the largest deal of the year, Bayer and Monsanto announced that they had signed a merger agreement whereby Bayer will acquire Monsanto in an all-cash transaction valued at $66 billion. Bayer's two previous offers were rejected by Monsanto; however, the current bid was accepted as it represents a 44 percent premium to Monsanto's shareholders. The closing of the deal will create a company comprising more than a quarter of the combined world market for seeds and pesticides in the farming supply industry. The transaction must be approved by regulatory agencies around the world, including the United States, Canada, Brazil, the European Union, and elsewhere. The market, with Monsanto's stock trading approximately 20% below the acquisition price, has demonstrated that investors have little confidence that regulatory approval will be obtained, but the negotiated deal termination fees indicate that Bayer has a much higher level of confidence.

Bayer's "reverse" termination fee -- the termination fee it must pay Monsanto if the transaction is not approved -- is $2 billion. It is quite common for parties to retain the right to terminate the merger agreement upon a court or governmental entity prohibiting the transaction, but of those, less than half have reverse termination fees. The average reverse termination fee as a percentage of transaction value for these transactions is 3.93%, which is slightly higher than the reverse termination fee payable by Bayer; however, there are only two transactions with a higher amount payable. In addition to the $2 billion becoming payable upon termination for a court or governmental order, the Bayer/Monsanto transaction has a specific provision making this fee payable if one or more of the regulatory conditions is not satisfied, including HSR approval, the European Commission approval, or other foreign antitrust approvals.

Another interesting feature of this transaction is that the outside date for closing the transaction is automatically extended for nine months if the regulatory conditions have not been satisfied by the initial outside date, or September 14, 2017. Of the 379 public merger transactions filed since 2015, only 21% have an automatic extension provision and the average extension period is only 86 days. In addition, Bayer is required to use reasonable best efforts to obtain the necessary regulatory approvals, including the requirement to sell or divest assets (i.e. a hell or high water provision), with noted exceptions for divestitures that will result in a substantial detriment to Bayer and its affiliates. For example, there is a limitation in any divestiture that will result in the one-year net loss to Bayer in excess of

$1.6 billion in net sales in the aggregate. Of the public merger transactions filed since 2015, a little more than half contain a hell or high water provision, and 88% of those transactions have some sort of limitation on the hell or high water provision.

The Bayer/Monsanto merger is a high profile transaction given the size of the deal and the number of regulatory approvals required around the globe. Bayer’s confidence and commitment to the deal demonstrated by the staggering $2 billion fee they must pay if it fails, seems to be in material contrast to the skepticism investors have demonstrated bidding the shares down more than 20% from the acquisition price.

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