

*Going Private:
Doing It Right*
*Getting to Fairness:
Substance and Process*

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“Going Private” Transactions

- Since “going private” transactions often involve “cashing-out” the public shareholders while significant shareholders and/or senior management are allowed to become an equity investor in the private buyout entity, an inherent conflict may exist

“Going Private” Transactions

- Use of a “Special Committee” of independent directors is the most common “cleansing” mechanism employed
- If only one or two directors are conflicted then a Special Committee may not be needed; although conflicted directors must then be recused from consideration of the transactions and any alternatives

The Special Committee

- Job is to represent the interest of the public shareholders and seek to duplicate an “arms-length” process
- Particular care must be taken by the members of the Special Committee to assure both (i) a fair process and (ii) a fair price

The Special Committee

- Independence and “disinterestedness” of directors on a Special Committee is fundamental
 - NYSE/Nasdaq independence not necessarily sufficient
 - Directors on Special Committee cannot be “ beholden ” (e.g. charitable contributions) or have other material relationships with management or sponsors
 - Prudent to even consider the “optics” of certain relationships

The Special Committee

- Role must be clearly defined in resolutions establishing the Special Committee
 - Ability to explore all alternatives
 - Full authority to review, evaluate and negotiate the transaction
 - Ability to engage independent advisors
 - Fee arrangement – structured to be consistent with objectives
 - Ability to reject offer (“just say no”), as well as, if appropriate, to negotiate terms
 - Board will not approve any transaction without the prior recommendation of the Special Committee

Getting Started

- Two key questions:
 - Is this a good time to sell?
 - Are the price and terms of the offer sufficient?
 - It is not just simply a question of "fairness"

Getting Started

- In order to reach a conclusion, the Special Committee and its advisors should have full understanding of all competing value alternatives, including stand-alone scenarios
 - Consideration of recent strategic presentations by management and/or outside advisors, including financial advisor retained by Special Committee
 - Requires sufficient time to do the analysis
 - Valuation analysis will be public if deal is approved

The Record

- Attention to record from the outset
 - Litigation is to be expected
 - Minutes are important
 - E-mails will be discoverable
 - SEC: 13e-3 disclosure obligation (reasons for supporting)

The Record

- Full access to all information
 - Importance of management projections
 - Must be same as those provided to potential financial sponsors of the transaction
- Analysis of business risk factors
 - Consistent with past disclosure?

Strategic Alternatives

- Should the company pursue “stand alone” independence and implement the existing business plan

Strategic Alternatives

- Should the company take proactive steps to create near-term shareholder value?
 - Leveraged share repurchase
 - Extraordinary dividend
 - Equity placement (White Squire/ESOP)
 - Acquisitions
 - Divestitures/Spin-off
 - Recapitalization

Strategic Alternatives

- Should the company explore third party alternatives?
 - Strategic Buyer
 - Private Equity Buyer

The Sale Process

- Timing of process
 - Special Committee, and not the buyout group, determines schedule
- Assessing universe of potential buyers
 - Strategic vs. private equity players

The Sale Process

- Various "sale" methods (assuming sale is to be explored)
 - Public auction
 - "Exploring strategic alternatives" press release
 - "Pre-signing" market check
 - Auction not legally required
 - "Private" auction
 - Risk of leak
 - One-off negotiations
 - Rely on "post-signing" market check and "go shop/no shop"

Managing Conflicts

- Addressing potential management conflicts
 - Limiting contacts of management with financial sponsors
 - No discussion of individual arrangements with management until Special Committee permits
 - Management commitment to meet with other potential bidders
 - Review of existing benefit arrangements

Managing Conflicts

- Limit “informal” contacts with members of the Special Committee
- Fairness Opinions
 - “Stapled financing” issue
 - Any concerns, get a second opinion

Other Issues

- Limit ability of potential private equity buyers to “tie up” competing bidders:
 - Other equity players
 - Debt financing
 - Exclusivity arrangements

Other Issues

- Identifying other issues in advance
 - Existing debt structure
 - CIC provisions in agreements with third parties
 - CIC provisions in agreements with employees
 - Anti-assignment provisions
 - Other contingent liabilities that could affect financing
 - State anti-takeover statute
 - Federal securities laws

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