

What's Next?

A Path Forward in Uncertain Times



Take-Private Transactions: Ten Key Take-Aways

What is a Take-Private Transaction?

A take private is a transaction in which a publicly-traded company returns to private company status generally as a result of a sale to one or more financial buyers.

Take-Away 1

High Price Wins (If There is a Winner)

- When a company decides to sell itself for cash, the Board of Directors generally has an obligation to obtain the highest price reasonably available (Delaware Revlon duties)
- Seller Board can just say NO—even if the price offered represents a premium
- Seller and its financial advisor will consider how to design a sale process, including consideration of a market check or use of a “go shop” provision

Take-Away 2

Don't Expect Exclusivity

- Pre-signing exclusivity is uncommon and, if granted, is typically for a short duration at the end of the process
- Seller may walk away and take a better deal after signing the merger agreement and before receipt of stockholder approval
- Seller Board also may change its recommendation to stockholders to approve the transaction in the face of a superior proposal or due to other rarely occurring intervening events



GOODWIN

Take-Away 3

Buyer Writes the Checks

- Cash bids for a public company are on a fixed, per share basis
- Typical price adjustments in a private M+A context do not apply
- Earnouts in public company M+A, which are called “contingent value rights,” are rarely used outside of the life sciences industry

Take-Away 4

More Seller Process = Less Buyer Control

- Sale process is driven by Seller Board of Directors
- Seller will request that Buyer execute a confidentiality agreement with a standstill provision, which gives the Board more control over the process
- Communications funneled primarily through financial and legal advisors
- Seller Board likely to require staging of any discussions with management regarding post-closing employment or compensation
- Seller Board, in conjunction with its financial advisor, will set process gates and attempt to control timing

Take-Away 5

No Buyer’s Remorse

- Public M+A transactions are subject to limited closing conditions, such as stockholder and regulatory approvals and no “Material Adverse Change” to Seller
- No contracting party remaining after the transaction, so no post-closing recourse for Seller breaches of representations, warranties or covenants
- Escrows and hold-backs are not market in public M+A transactions

Take-Away 6

Show Seller the Money

- Financing conditions are rare and materially disadvantage a bid
- At signing, Seller will expect fully-executed debt and equity commitment letters, including a limited guarantee of certain merger agreement terms
- Merger agreement will include additional representations, covenants and remedies with respect to Buyer’s financing

Take-Away 7

Keeping Management in the Game

Parties will need to consider issues with respect to:

- Treatment of existing compensation of Seller employees
- Compensation of Seller employees between signing and closing
- Post-closing treatment of Seller employees
- Potential new arrangements with Buyer

Take-Away 8

There are No Secrets

- Potential leaks and media attention pre-signing
- Announcement release and other investor / employee communication materials (subject to SEC filing)
- Current reports on Form 8-K, including a copy of the merger agreement
- Proxy statement or tender offer materials, which will include detailed disclosure regarding the background of the transaction and financial and compensation matters

Take-Away 9

Ready Yourself for Litigation

- Practically all public company sale transactions result in stockholder litigation
- Plaintiffs may precede litigation with a books and records request under state corporate law
- Stockholders also may pursue appraisal rights claims under state corporate law
- In addition, FINRA will conduct an investigation into any trading in the Seller stock preceding the announcement of the transaction

Take-Away 10

Location, Location, Location

- Take privates involving foreign issuers predominantly involve China-based issuers, with key process differences from transactions with US issuers
- Take privates for markets like the UK and Hong Kong also are run via a very different process under the relevant Takeover Code of that country

Contact Us



Stuart Cable
Partner, Boston
Vice Chairman, Goodwin;
Global Chair of M+A
+1 617 570 1322
scable@goodwinlaw.com



Lisa Haddad
Partner, Boston
Co-Chair, Public M+A/
Corporate Governance
+1 617 570 8311
lhaddad@goodwinlaw.com



John Haggerty
Partner, Boston
Co-Chair, Public M+A/
Corporate Governance
+1 617 570 1526
jhaggerty@goodwinlaw.com



Lynda Galligan
Partner, Silicon Valley
Co-Chair, ERISA +
Executive Compensation
+1 650 752 3167
lgalligan@goodwinlaw.com



Caroline Bullerjahn
Partner, Boston
Securities Litigation +
White Collar Defense
+1 617 570 1359
cbullerjahn@goodwinlaw.com



Douglas Freeman
Partner, Hong Kong
Private Equity
+852 3658 5328
dfreeman@goodwinlaw.com

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP or its attorneys.

Copyright © 2020 Goodwin Procter LLP. Prior results do not guarantee a similar outcome.



GOODWIN