

# 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**