

CAPITAL MARKETS

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# Take Private Transactions

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# Agenda

- Current Trends
- What is a Going Private Transaction
- Processes
- Key Things to Consider
- Controlling Stockholders
- Board Considerations
- Disclosure Obligations

## ATTORNEY SPEAKERS



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Justin is a corporate partner based in the Houston and New York offices. He regularly represents public and private companies, underwriters, and investors in the energy, technology, financial services, and consumer products sectors on public and private capital markets and M&A transactions, special situations, and restructuring matters. He has extensive experience advising energy companies in connection with securities offerings and acquisition financings, particularly in the upstream, midstream, and oilfield services sectors, as well as coal mining and renewables. Justin also has significant experience in high yield debt securities, having led billions of dollars of bond transactions for both issuers and underwriters.

- Represented 5E Advanced Materials while undergoing a restructuring
- Represented Bristow Group Inc. in connection with its petition for relief under Chapter 11 of the U.S. Bankruptcy Code
- Represented a dealer manager in connection with Calumet Specialty Products Partners, L.P.'s US\$200M notes exchange offer and related consent solicitation
- Represented Rubicon Technologies, in the sale of their fleet technology



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Ben is a member of the Firm's corporate and capital markets practice groups. He advises companies, private investors, financial advisory firms, and private equity clients in a variety of capital markets and M&A transactions including disclosure and reporting obligations under U.S. federal securities laws, stock exchange listing obligations, and general corporate governance matters. Ben's broad capital markets experience includes initial public, follow-on, and secondary offerings and private investment in public equity (PIPE) transactions, as well as extensive experience representing special purchase acquisition company (SPAC) sponsors, investors, and underwriters in initial public offerings (IPOs) and business combinations.

- Represented StoneBridge Acquisition Corp., in connection with the closing of its business combination agreement
- Represented Mobiv Acquisition Corp., in the completion of its previously announced business combination
- Regularly advises and represents financial advisors to special committees of public companies

# Current Trends

- Companies that went public through De-SPAC Transactions
- Companies with depressed stock prices
- Consolidation

# What is a Going Private Transaction?

- Process by which a publicly traded company is acquired for cash and ceases to be a separate/standalone public company.
- A transaction or series of related transactions that results in:
  - (a) the termination of a public company's reporting requirements under the Securities Exchange Act of 1934 and the delisting of the company's stock from the relevant stock exchange, and
  - (b) the company being owned by a person or group of persons

# Types of Take-Private Deals

- **General take-private:** an acquisition of a public company for cash (i.e., such that the company ceases to be “public”), irrespective of the type of acquirer
- **Sponsor take-private:** an acquisition of a public company by a private equity sponsor, typically in a leveraged buyout transaction
- **Controller take-private:** an acquisition by a controlling shareholder of the remaining shares of a public company’s stock that it does not own



# Why Go Private or Take-Private?

## ADVANTAGES

- Integrate operations efficiently and effectively
- Focus on long-term strategy
- Elimination of cost of being a standalone public company
- Elimination of minority stockholder base
- Escape low trading volumes and lack of analyst coverage
- Tax benefits – increase leverage from consolidation

## DISADVANTAGES

- Requires shareholder approval
- Less flexibility as to who the shareholders of the post transaction company will be
- Risk of litigation

# Options for Going Private

## One-Step: Statutory Merger

- A merger completed in one transaction, after either the target company's stockholders approve the transaction or effect a short-form merger.

## Two-Step: Tender Offer Followed by “Back-End” Merger

- Buyer initiates a tender offer to acquire at least a majority of the outstanding target company's stock and then completes a back-end merger to acquire the balance of the target company's stock.

## Sale of Assets

- The acquirer could acquire all the target's assets, followed by the target's liquidation and dissolution.

## Reverse Stock Split

- Target files an amendment to its charter documents to affect a reverse stock split in which the target's outstanding shares are combined into a fewer number of shares, and any fractional shares after the split would be converted into the right to receive cash.

## Self-Tender Offer

- Target commences a tender offer directly to its stockholders (other than the acquirer).



# One-Step: Statutory Merger

# One-Step: Statutory Merger

Negotiation of merger agreement between acquirer and the target.

Approval of agreement by target's board of directors and acquirer's board of directors, followed by execution of agreement.

Filing with SEC preliminary proxy materials to be used to solicit approval of target's shareholders of the transaction.

Receipt of SEC comments (if any) and any necessary revisions to the proxy materials are made.

Following SEC clearance, mailing of the definitive proxy materials to the target's shareholders.

Adoption of the merger agreement by target shareholders (E.g. at shareholder meeting or by written consent).

Closing of merger upon satisfaction or waiver of parties' obligations, including receipt of regulatory approvals.

# Two-Step: Tender Offer Followed by a “Back End” Merger

# Two-Step: Tender Offer

Negotiation of merger agreement between acquirer and target.

Approval of merger agreement by target's board of directors and the acquirer's board of directors, followed by execution of agreement.

Commencement of tender offer based on the terms of the agreement, including disseminating tender offer materials to shareholders and filing materials with SEC.

Receipt of SEC comments (if any) on tender offer materials and, if applicable, making any necessary amendments to those materials.

Closing tender offer upon satisfaction or waiver of conditions, including satisfaction of any "minimum condition" and receipt of regulatory approvals.

Effecting the back-end merger assuming the satisfaction or waiver of the conditions thereto.



# Two-Step: Tender Offer – Minimum Conditions

- Most important condition in a Two-Step Tender Offer.
- Minimum number of target shares which must be tendered for the acquirer to be obligated to complete the offer and purchase the shares.
- Generally based on number of shares the acquirer needs to own so that it will have a sufficient number of votes for a back-end merger.

# One-Step vs. Two-Step

## ONE-STEP

- Preferred with Extended Regulatory Review
  - Shareholder approval can be obtained before regulatory and other approvals.
- Financing simpler, particularly in the case of highly leveraged transactions, because there is only a single closing.
  - Most leveraged acquisitions have been structured as one-step transactions so that the target's assets can be used to secure a financing loan.

## TWO-STEP

- Faster completion
  - Tender offer often can be completed in as little as 20 business days after commencement.
  - Can commence stockholder solicitation activity prior to any SEC review.
  - No stockholder vote provides for faster execution and greater deal certainty
- Preferable in transactions where regulatory approvals will not cause closing delay.



# Key Things to Consider

## Corporate Governance

For tender offer, acquirer will not need approval of target's stockholders as it would in a one-step merger.

## Consent

Third-party consents and approvals required. These requirements vary depending on approach and ID of buyer.

## Financing

Some lenders will not finance a two-step merger if the second-step short-form merger cannot occur concurrently with the closing of the tender offer.

## Tax

Important tax considerations depending on the form of the transaction is critical.

# Fiduciary Duties





# Fiduciary Duties – Delaware Corp. Generally

- Business Judgment Rule
  - DE courts are reluctant to substitute their judgment for that of the Board, unless the Board's decision cannot be attributed to any rational business purpose
  - Often outcome-determinative
- Enhanced Scrutiny
  - **Revlon standard** → Sale of control generally requires the Board to obtain the highest price reasonably available
  - **Unocal standard** → Deal protection devices must not be preclusive of other bids or coercive of the stockholders
  - **Entire Fairness** – Most onerous standard of review performed by courts (often outcome determinative)

# Controlling Stockholders – Conflict Transactions

- A controlling stockholder is someone who either:
  - (a) Owns more than 50% of the voting power of the corporation; or
  - (b) Exercises control over the business and affairs of the corporation.
- Whether a minority stockholder “exercises control” is based on:
  - board designation rights,
  - other contractual rights such as veto rights,
  - debt holdings, and
  - “outsized influence”
- Controlling Stockholders owe fiduciary duties to other stockholders.



# Conflict Transactions – Entire Fairness

- Generally, burden of proof is on the defendants.
- Must establish transaction was the result of:
  - (a) **Fair dealing**, and
    - Fair process with respect to timing, structure, negotiations, and approvals.
  - (b) **Fair price**.
    - Substantively fair considering all relevant factors including financials, market value, and prospects.
- Applies in two circumstances:
  1. Controlling stockholder **stands on both sides** of a transaction or **receives different consideration** to the detriment of the other stockholders; or
  2. Majority of directors approving the transaction were **not disinterested or independent**.
- Liability includes exculpatory provisions, duty of care, duty of loyalty, and damages.



# Conflict Transactions – Entire Fairness

- Burden of Proof shifts to Plaintiffs when there is either:
  - Independent **special committee** approval, or
  - **Majority of the minority** approval
- Restoring Protections of the Business Judgment Rule
  - A fully-functioning independent **special committee** of the board with full authority to select its advisers, negotiate the transaction, and, if it chooses, say no, and
  - conditioning the transaction on approval by a fully informed and uncoerced **majority of the minority** stockholder's vote.
- Conditions must be established by controlling stockholder at the beginning of its efforts to go private (before substantive economic negotiations commence)



# Potential Board Concerns

## Litigation Risk

Breach of Fiduciary Duties  
Disclosure claims

## Controlling Stockholder Transactions

Entire Fairness  
Procedural Safeguards (special committee approval and/or majority of the minority approval)  
Competing Offers

- Plaintiffs may allege the special committee acted in bad faith by passing on significantly higher third party offers



# Potential Board Concerns

## *Revlon Duties*

- Triggered if the board initiated an active bidding process, decided to sell the company in a change-of-control transaction, or a sale of control has become inevitable.
- Possible mitigation procedures: Meaningful pre-signing market check vs. single bidder process with post-signing go-shop.
- Include deal protection devices reasonably tailored to the particular transaction

## Restoring Business Judgement Rule with a Stockholder Vote

- A **fully informed, uncoerced** vote by disinterested stockholders of a transaction with a non-controlling stockholder is outcome-determinative and cleanses the board's conduct
- One-sided controller transactions may still implicate Entire Fairness review if the controller holds a separate class of shares and receives additional consideration than the minority stockholders.

# SEC Disclosure Obligations

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Schedule 13D/Section 16

Schedule 14A

Schedule Tender Offer and Schedule 14D-9

Schedule 13e-3



# SEC Disclosure Obligations

## **Schedule 13D/Section 16 Ownership Reports**

A controlling stockholder or other 5%+ owner must amend its Schedule 13D filing if it proposes a going private transaction

Must be filed promptly after the owner forms the intent (not based on definitive documents or launch of tender offer)

13G filer must file a 13D within 10 days after it forms the intent to change or influence control of the company

Less than 5% owners should be careful of “groups”

Greater than 10% owners that have sold target company stock in the last 6 months should be wary of the short-swing profit rules of Section 16

## **Schedule TO and Schedule 14D-9**

Tender offer open at least 20 business days; remain open for at least 5 business days after disclosure of material information and at least 10 business days after withdrawal rights

Company must file Schedule 14D-9 within 10 business days after the commencement of the tender offer to disclose either that it recommends that stockholders accept or reject the tender offer or that it expresses no opinion

## **Schedule 14A Proxy Statement**

# SEC Disclosure Obligations

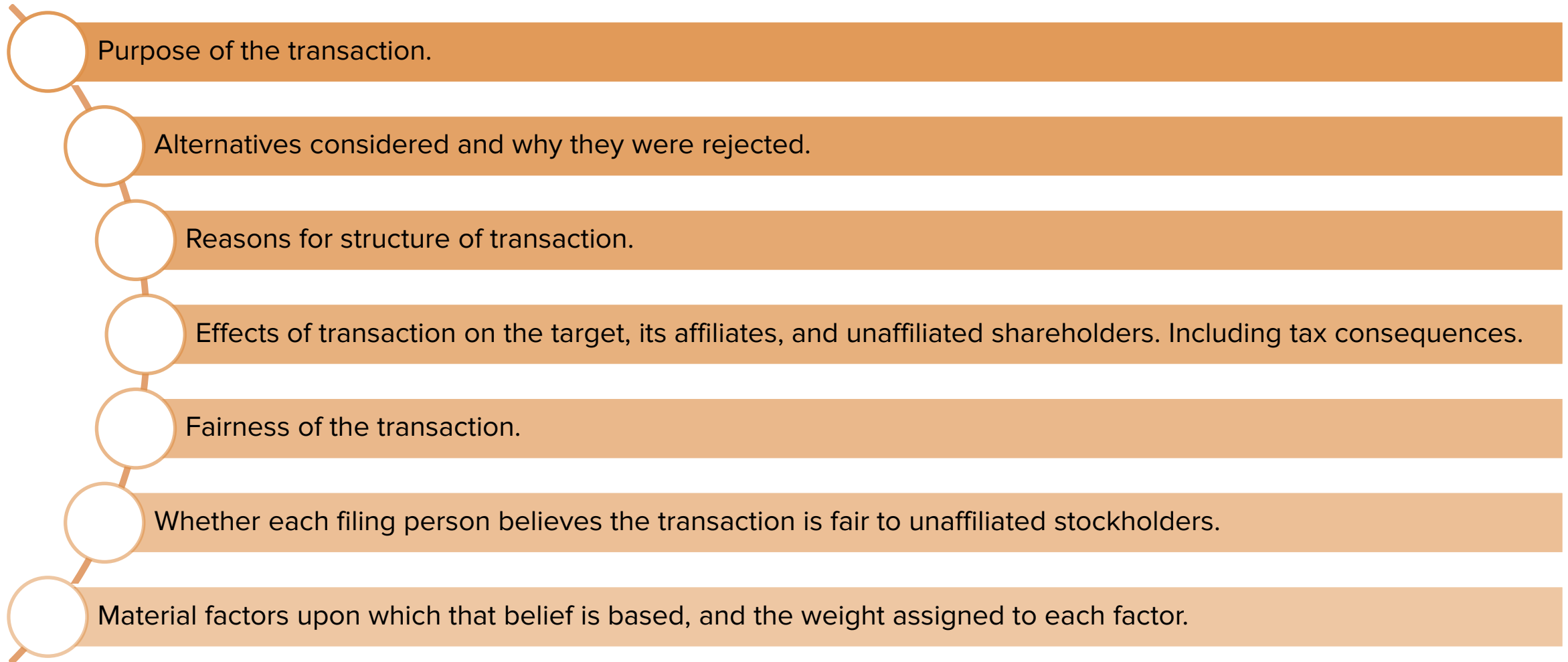
Rule 13e-3 imposes special disclosure requirements for certain going private transactions. Must comply with general requirements (e.g., the proxy and tender offer rules) as well as the enhanced requirements under 13e-3.

A transaction will be subject to Rule 13e-3 if it satisfies all of the following criteria:

- **Transaction Type:**
  - (1) purchase of any equity security by the target or an affiliate of the target,
  - (2) tender offer for any equity security by the target or an affiliate of the target, or
  - (3) proxy or consent solicitation or distribution of an information statement by the target or an affiliate of the target in connection with a merger or similar corporate reorganization, an asset sale or a reverse stock split involving a repurchase of fractional interests.
- **Participants:** transaction is “engaged in” by the target or an “affiliate” of the target
- **Effects:** It has a “reasonable likelihood or purpose” of causing any class of public equity securities of the target company to either become eligible for termination from registration or reporting obligations under the SEC rules or removed from listing on a national securities exchange.

Does not apply to second step short-form mergers

# Schedule 13e-3 “Special Factors”

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- Purpose of the transaction.
  - Alternatives considered and why they were rejected.
  - Reasons for structure of transaction.
  - Effects of transaction on the target, its affiliates, and unaffiliated shareholders. Including tax consequences.
  - Fairness of the transaction.
  - Whether each filing person believes the transaction is fair to unaffiliated stockholders.
  - Material factors upon which that belief is based, and the weight assigned to each factor.

# “Special Factors” Continued

Reports, Opinions, Appraisals, and Negotiations relating to the value of the transaction and its “fairness” from a financial point of view.

Disclosure of both written and oral information, and whether those documents were prepared in connection with the proposed transactions.

Extensive financial information: two years of audited financial statements, the most recent quarterly financial statements of the company, and the pro forma impact of the transaction on the company.

Financial projections may be required if they were provided to the acquirer.

Must disclose the identity of the outside party, including whether any material relationship exists between the outside party and the target company or its affiliates.

Whether the outside party or the target company (or its affiliate) determined the price.

A summary of the procedures followed, any findings and recommendations, and the basis for and methods of arriving at the findings and recommendations.

# Debt Considerations

## Existing Debt – Rollover vs. Retire

- **Rollover**
  - Change in control triggers – defaults, mandatory buybacks
  - Restricted payment covenants (as applicable to equity redemptions, junior debt retirement)
  - Financial covenant amendments as required in connection with post-transaction capital structure
  - Practical limitations in negotiating changes
- **Retire**
  - Make-whole or prepayment provisions
  - Notice periods and impact on transaction timing; rescission rights if transaction dies

## New Debt

- Ranking in relation to rollover debt
- Trigger defaults under rollover debt

## Fraudulent conveyance analysis to pro forma debt structure



# Deregistration Process – “Going Dark”

- **Source of Reporting Obligations under Exchange Act:**
  - Section 12(b) – listed on national securities exchange
  - Section 12(g) – more than 2000 record holders/500 unaccredited investors
  - Section 15(d) – sold securities pursuant to an effective registration statement
- A company can simultaneously have multiple reporting obligations
- **File Form 25 to terminate Section 12(b) registration:**
  - The exchange will file the Form 25 in most M&A scenarios
  - Takes effect 10 days after filing
  - Must still file periodic and current reports until effective
- **File a joint Form 15 to terminate Section 12(g) and Section 15(d) registration:**
  - May not be filed prior to the effectiveness of the related Form 25
  - Takes effect 90 days after filing
  - Unlike Form 25, the Form 15 filing immediately suspends requirement to file current and periodic reports
  - However, obligations under Section 16 (ownership reports and short-swing liability), Section 14(a) (proxy statements), and Section 13(d) continued until it becomes effective.

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