Practical Guidance

Going Private Transactions: Structuring and Planning

A Practical Guidance® Practice Note by Michelle Heisner, Baker McKenzie LLP

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This practice note will discuss considerations for the M&A attorney in the planning and structuring stages of a going private transaction, including: key motivations for going private, considerations regarding transaction structures, and securities regulation of going private transactions, particularly, Rule 13e-3 and the disclosure and filing requirements for Schedule 13E-3.

For timetable/checklists to use in planning and executing going private transactions, see:

- Going Private Transaction Timetable Checklist (Cash Merger without a First Step Tender Offer Transaction) (DE)
- Going Private Transaction Timetable Checklist (Merger with First Step Tender Offer Transaction) (DE)

What is a Going Private Transaction?

A "going private" or "take private" transaction is commonly understood to mean a transaction or series of related transactions that results in (i) 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 (ii) the company being owned by a person or group of persons with some prior "control" relationship with the company. Unlike other M&A transactions in which a public company is deregistered or delisted, going private transactions present unique fiduciary duty issues because of the insider relationship between the acquirer and the target. Since the acquirer essentially stands on both sides of the transaction, it could potentially structure the transaction to give itself more favorable terms or to coerce the unaffiliated stockholders into selling their shares. A detailed discussion of fiduciary duty issues in going private transactions is available in Fiduciary Duties and Procedural Safeguards in Going Private Transactions.

As a result of the potential for self-dealing, going private transactions are subject to certain disclosure requirements and other obligations under state and federal laws. Going private transactions are also frequently the subject of suits brought by minority stockholders. Therefore, the deal parties in a going private transaction, together with their counsel, should ensure their transaction complies with the relevant legal requirements and implement certain safeguards to insulate themselves from claims that they acted in their own self-interest to the detriment of minority or unaffiliated stockholders.

Key Motivations for Going Private

A corporation (or its principal stockholders or management) may consider going private for a number of reasons, including:

- *Focus on long-term strategy:* A publicly held company is often under tremendous pressure to meet financial forecasts and analyst expectations. By going private, company management may be able to focus on long-term strategic moves rather than short-term profits.

- *Elimination of public company disclosure and compliance obligations:* Public companies are required to file periodic disclosures with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

  Public companies also must comply with the Sarbanes-Oxley Act of 2002, which imposes certain requirements over a public company's corporate governance, internal controls, and financial disclosure. In addition, public companies must comply with the rules of the stock exchanges on which their stock is traded. Compliance with all these requirements often involves (i) disclosure of sensitive information about the company and its business, (ii) exposure of senior executives to personal liability for certain compliance failures, and (iii) significant legal, accounting, and other expenses (such as outside directors' fees and D&O liability insurance premiums). Going private would eliminate a company's obligations to comply with these requirements and the risks and costs associated with them.

- *Elimination of minority stockholder base:* A vocal minority stockholder base can present challenges to the controlling stockholder and management through the proxy process or the courts. Considering that controlling stockholders may owe fiduciary duties to minority stockholders, buying out the minority can eliminate the distractions of dealing with unhappy stockholders and reduce the litigation risk to the controlling stockholder.
- *Tax Benefits.* Where a going private transaction is achieved through a leveraged buyout, the acquirer and target may realize the tax benefits of a more leveraged capital structure than would be acceptable for the target as a public company.

Going private does have disadvantages. Since the result of a going private transaction is the deregistration and delisting of the company's stock, the newly private company will no longer have easy access to the public capital markets, a liquid acquisition currency, or visibility with the general public. Moreover, if the going private transaction is financed, the company may be saddled with a heavy debt load after closing.

Going Private Transaction Structures

Typically, a take private transaction will be structured as either a one-step merger or two-step merger (also known as a two-step tender offer), but may also take the form of an asset sale, a reverse stock split or a self-tender, depending upon the circumstances of the particular deal. In choosing an appropriate structure, the parties and their counsel should consider several factors, including:

- Who the acquirer is and the motivation for taking the target private;
- Required shareholder approvals and third-party consents;
- Whether or not the acquirer needs financing;
- Tax implications; and
- Any applicable interested stockholder or business combination statutes.

One-Step or Two-Step Merger

The most common structures used in going private transactions are the one-step merger and the two-step merger.

- ***One-Step Merger.*** In a one-step merger, the acquirer (or a merger subsidiary owned by the acquirer) merges with the target company in a statutory long-form merger upon obtaining the requisite stockholder vote under applicable state law.
- ***Two-Step Merger.*** In a two-step merger, the acquirer or its merger subsidiary first launches a tender offer for the shares of target's stock that the acquirer does not already own and, once it has acquired a majority or more of such shares, engages in a "back-end" merger to acquire the rest.

  If the acquirer owns between 85 to 90% of the target's stock (depending on applicable state law) at the end of the tender offer, the acquirer can acquire the remaining target stock through a short-form merger, which would not require a stockholder vote.

  The acquirer may negotiate a merger agreement with the target before or after launching the tender offer or unilaterally launch the tender offer without negotiating an agreement with the target's board of directors. Although it is theoretically possible for an acquirer to make privately negotiated or open market purchases of the target company's stock to reach the threshold required to execute a short-form merger, it is most likely that to achieve a going private transaction through a two-step merger, an acquirer will need to negotiate with the target company's board of directors (or special committee thereof) because beneficial ownership reporting requirements and the possibility that these purchases may trigger application of the tender offer rules generally makes an approach that does not involve the target company's board of directors impracticable.

If the acquirer does not acquire enough shares in the tender offer to carry out a short-form merger, it could either acquire the remaining shares through a long-form merger (which would require a stockholder vote) or, if provided for in the merger agreement, exercise a "top-up" option in which the target would issue new shares to the acquirer that would get the acquirer's ownership up to the short-form merger threshold. Notably, Section 251(h) of the Delaware General Corporation Law (DGCL), which became effective August 1, 2013 (and was amended effective August 1, 2014), effectively permits the simultaneous closing of a negotiated tender offer and "back-end" merger if the requisite number of the target's shares (typically, a majority) are tendered and accepted in the tender offer and the transaction meets certain other requirements set forth in the statute. In order to use a top-up option: (a) there must be a sufficient reserve of the company's authorized but unissued stock in place to cover the option and (b) the company is required under Nasdaq or NYSE rules to obtain stockholder approval when issuing an amount of shares equal to 20% or more of its outstanding stock.

Two-step mergers that involve tender offers for cash consideration have a timing advantage over one-step mergers because SEC approval of a Schedule TO (tender offer statement) is not required for the tender offer to begin (though the SEC may require the Schedule TO to be amended or supplemented after filing). An extensive SEC review process on proxy materials used in connection with one-step mergers in going private transactions should be expected.

The mechanics of one- and two-step mergers are discussed in further detail in Public Merger Agreement Basics. Section 251(h) of the DGCL is discussed in detail in Tender Offers under Amendments to the Delaware General Corporation Law.

One-Step Merger	**Two-Step Merger**
Advantages	
Useful if a longer period of time between signing and closing is needed (e.g., to obtain regulatory or other third-party approvals). • Shareholder approval can be obtained before regulatory and other approvals. • Because fiduciary out provisions in merger agreements typically terminate upon receipt of shareholder approval, the risk that an interloper may appear can be reduced in a one-step merger as compared to the two-step merger. In a two-step merger, for so long as a tender offer remains open it is subject to interloper risk and the risk that market changes make the offer less attractive to target shareholders.	It is possible that transaction can be executed more quickly with a two-step merger. • Can commence stockholder solicitation activity prior to any SEC review • No stockholder vote provides for faster execution and greater deal certainty Thus, in transactions where regulatory approvals will not cause closing delay, a two-step merger may be preferable.
Financing simpler, particularly in the case of highly leveraged transactions, because there is only a single closing.	
The best price rule, which generally requires that the consideration paid to any securityholder for securities tendered in the tender offer is the highest consideration paid to any other securityholder for securities tendered in the tender offer and that all shareholders involved must have an equal right to elect the type of consideration received, is not implicated. Thus, if management equity rollovers are contemplated, a one-step merger may be preferred.	

Disadvantages	
The transaction may take more time to close. • A thorough SEC review should be anticipated. • Longer timeframe to convene and hold a shareholder meeting.	If the first step tender offer is conditioned on a 90% tender and a top-up option is not available to permit the acquirer to implement a short-form merger in the second step, then there is the potential for a hold up by minority shareholders. The risk of a hold-up would be mitigated if the two-step merger would be effected pursuant to DGCL Section 251(h).
More time in the transaction process can mean additional expenses.	The "fiduciary out" remains open until the end of the tender offer, which from an acquirer perspective may be a disadvantage in that it heightens the risk of an interloper.
	The "best price rule" is applicable to tender offers, leaving an acquirer with less flexibility in determining the form and amount of consideration as compared to a one-step merger (e.g., when structuring a management rollover).
	Financing may be necessary at the closing of the first step tender offer. Federal margin rules, restrict borrowings secured by public company stock to 50% of its market value, may impose certain impediments on the acquirer's ability to pledge all of the company's assets to its lenders at the initial closing or provide its lenders full covenant coverage, among other complicating factors.

Other Structures

Other structures that can be used to effect a going private transaction include:

- ***Sale of Assets.*** The acquirer could acquire all or substantially all of the target's assets, followed by the target's liquidation and dissolution. More information on asset sales can be found in the Asset Acquisition Resource Kit.
- ***Reverse Stock Split***. The target could file an amendment to its charter documents to effect 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. The applicable ratio (e.g., 1-for-10) is established so that the reverse stock split results in the target's largest stockholders owning all of the outstanding shares and the remaining stockholders receiving cash in lieu of fractional shares. This will effectively eliminate some smaller shareholders of record and reduce the total number of shareholders of record of the issuer. More information on reverse stock splits can be found in the Reverse Stock Split Checklist.
- ***Issuer Self-Tender.*** The target itself could commence a tender offer directly to its stockholders (other than the acquirer). More information on tender offers can be found in Market Trends 2019/20: Tender and Exchange Offers.

Factors to Consider in Choosing a Going Private Structure

Acquirer's Identity and Objective

The ultimate structure chosen for a going private transaction will depend on a number of factors. Two primary factors are the identity of the acquirer and the acquirer's objective in taking the company private. Typical acquirers in a going private transaction include controlling stockholders, company management (usually partnered with a private equity firm or other financial backer), and the target itself. If the target is taking itself private simply to reduce the stockholder base to fewer than 300 stockholders of record (or fewer than 500 stockholders if the company does not have significant assets), thus allowing the corporation to terminate its Exchange Act registration, then it may choose to engage in a reverse stock split or issuer self-tender. If, however, a controlling stockholder seeks to acquire the target outright, then a merger may be a more appropriate structure.

Other Factors

In addition to acquirer identity and objectives, the choice of transaction structure for a going private transaction may be driven by, among other things:

- *Corporate governance issues:* An acquirer may want to use a particular transaction structure to avoid stockholder approvals or other corporate governance requirements. For instance, if the acquirer launches a tender offer, it will not need approval of the target's stockholders as it would in a one-step merger (although it will still likely need a minimum number of target stockholders to tender their shares in the tender offer).
- *Third-party consents and approvals:* For example, if the going private transaction will be effected as a merger, it may be structured as a reverse triangular merger, in which the acquirer's merger subsidiary merges into the target and the target survives the merger. This structure will usually require fewer third-party consents, since the target's assets and liabilities will remain in its name (though consents may still be required with respect to contracts that have change of control provisions).
- *Acquirer's need for 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 considerations and attributes:* As with any M&A transaction, tax treatment of the going private transaction will be of paramount importance. For more information on taxation issues in structuring an M&A transaction, see Tax Benefit Maximization in Mergers and Acquisitions.

Interested Stockholder or Business Combination Statutes

The transaction parties will also need to consider the applicability of interested stockholder or business combination statutes, which many states have adopted as part of their corporation laws. For example, Section 203 of the DGCL may limit the ability of a controlling stockholder to structure the acquisition as a unilateral tender offer if the controlling stockholder has not held its position for at least three years. Applicability of state dissenters' rights or appraisal rights statutes also may affect the structure of the transaction. For example, in Delaware, appraisal rights are only available in the context of a statutory merger (long-form or short-form), not in other transaction forms such as an asset sale or reverse stock split.

The structure of a going private transaction may impact the level of judicial review. However, jurisprudence on this issue is evolving. For more discussion on the fiduciary duties of the deal parties in a going private transaction and the judicial standards applied to such transactions, see Fiduciary Duties and Procedural Safeguards in Going Private Transactions.

Applicability of Rule 13e-3

Rule 13e-3 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.13e-3, the Securities and Exchange Commission's going private rule, makes it illegal for an issuer or its affiliates to effect a going private transaction unless certain detailed disclosure requirements are met. The rule seeks to provide greater transparency for minority or unaffiliated stockholders, who are susceptible to potential coercion and other manipulative tactics by the parties to the going private transaction. See SEC Release No. 34-17719, 46 FR 22571 (April 20, 1981). Generally, parties to a going private transaction subject to Rule 13e-3 must file a Schedule 13E-3, 17 CFR 240.13e-100, with the SEC and amend or update the filing as necessary. The Schedule 13E-3 is filed in addition to, and not in lieu of, proxy or information statements, tender offer documents, or other SEC filings required in connection with the transaction.

Determining if a Transaction is Subject to Rule 13e-3

Rule 13e-3 applies when an issuer or any of its affiliates engages in a transaction or series of transactions that will cause a class of the issuer's equity securities to become eligible for deregistration (generally, when there are fewer than 300 stockholders of record, or if the company does not have significant assets, fewer than 500) or delisting from a national exchange. The rule defines a "Rule 13e-3 transaction" as any transaction or series of transactions involving one or more of the transactions described below which has either a reasonable likelihood or a purpose of producing, either directly or indirectly, either of the following effects: (A) causing any class of equity securities of the issuer which is subject to Section 12(g) or Section 15(d) of the Exchange Act to become eligible for termination of registration under Rule 12g-4 (§ 240.12g-4) or Rule 12h-6 (§ 240.12h-6), or causing the reporting obligations with respect to such class to become eligible for termination under Rule 12h-6 (§ 240.12h-6); or suspension under Rule 12h-3 (§ 240.12h-3) or Section 15(d); or (B) causing any class of equity securities of the issuer which is either listed on a national securities exchange or authorized to be quoted in an inter-dealer quotation system of a registered national securities association to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association:

- A purchase of any equity security by the issuer of such security or by an affiliate of such issuer;
- A tender offer for or request or invitation for tenders of any equity security made by the issuer of such class of securities or by an affiliate of such issuer; or
- A solicitation subject to Regulation 14A [Rule 14a-1 to Rule 14b-1] of any proxy, consent or authorization of, or a distribution subject to Regulation 14C [Rule 14c-1 to Rule 14c-101] of information statements to, any equity securityholder by the issuer of the class of securities or by an affiliate of such issuer, in connection with: a merger, consolidation, reclassification, recapitalization, reorganization or similar corporate transaction of an issuer or between an issuer (or its subsidiaries) and its affiliate; a sale of substantially all the assets of an issuer to its affiliate or group of affiliates; or a reverse stock split of any class of equity securities of the issuer involving the purchase of fractional interests.

17 C.F.R. § 240.13e-3(a)(3).

What Does it Mean to "Engage In" a Transaction?

The issuer or its affiliate does not have to be a transaction party to be considered to be "engaging in" a going private transaction for Rule 13e-3 purposes. For instance, if the issuer's board recommends that its stockholders tender their shares in a tender offer launched by an affiliate, the issuer may be deemed to be "engaging in" the transaction even if it did not enter into an acquisition agreement with such affiliate. One common scenario in which affiliates may be "engaging in" a going private transaction is when a private equity acquirer offers employment terms to the issuer's management in connection with the transaction.

As discussed in Who is an Affiliate? below, an issuer's senior executives are considered to be affiliates of the issuer. The mere fact that an executive will enter into a "reasonable and customary" employment agreement in connection with a transaction will not result in such executive also being treated as an affiliate of the acquirer. See SEC Release No. 34-16075, 44 FR 46736 (August 2, 1979), note 6. However, if the acquirer offers a materially better incentive package, or requires or permits an executive to have an equity interest in the post-closing entity, then the executive may be deemed an affiliate of the acquirer and, accordingly, engaging in the going private transaction on the acquirer's behalf. These situations are sometimes referred to by practitioners as "technical" going private transactions. There is considerable (although not easily harmonized) SEC guidance on this topic. See, e.g., SEC Telephone Interpretations Manual (July 1997 - Question P.3.), available at http://www.sec.gov/interps/telephone/cftelinterps_goingprivate.pdf. As a general guideline, most practitioners would consider a deal in which the issuer's management will retain an equity interest of 10% or more in the post-closing entity to be a Rule 13e-3 transaction.

Who is an Affiliate?

When the acquiring party engaging in the going private transaction is not the issuer itself, the applicability of Rule 13e-3 will depend on whether the party is an affiliate of the issuer. Rule 13e-3(a)(1) defines an "affiliate" as "a person that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with such issuer." "Control" is generally understood to mean the power to direct the management or policies of the issuer in some way (e.g., by voting or by contract). See Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2.

Directors, Executive Officers or Majority Stockholders. In general, a director, executive officer, or majority stockholder of an issuer will have the requisite control relationship with the issuer such that he or she will be deemed to be an affiliate for Rule 13e-3 purposes. Accordingly, a "squeeze-out" acquisition by a majority stockholder or a true management-led MBO will generally be subject to Rule 13e-3 without the need for much analysis.

Analysis When Control of the Issuer is Less Clear. Where the acquirer's control of the issuer is less clear cut—for example, because the acquirer owns a significant block, but not a majority, of the issuer's outstanding shares—the analysis will require an examination of the facts and circumstances surrounding the acquirer's relationship with the issuer, including:

- The acquirer's ownership percentage of the issuer;
- Whether the acquirer and the issuer have any directors, executive officers, or stockholders in common;
- Whether the acquirer has the power, by contract or otherwise, to appoint directors to the issuer's board;
- Whether the issuer has any other significant stockholders other than the acquirer; and
- The existence and nature of any other past, present, or future relationships between the acquirer and the issuer.

Excepted Transactions

Rule 13e-3 contains exceptions for certain transactions that otherwise would be subject to the rule.

- *Rule 13e-3(g)(1): Tender Offer/"Clean Up" Transaction.* Under Rule 13e-3(g)(1), an acquirer who has become an "affiliate" of the issuer by virtue of a tender offer can engage in a "clean-up" transaction within one year of the termination of the tender offer as long as the consideration offered in the clean-up transaction is at least equal to the highest consideration offered in the tender offer and certain other conditions are met. See Rule 14-10, Exchange Act.

- *Rule 13e-3(g)(2): Issuer Stockholders Receive Equivalent Equity Securities.* Another important exception is found in Rule 13e-3(g)(2), which provides that Rule 13e-3 does not apply to transactions in which the issuer's stockholders receive equivalent equity securities. Such transactions are viewed by the SEC as being outside the purpose of Rule 13e-3 since stockholders maintain an equity interest and are not being "cashed out." The SEC has stated that the exception also applies if stockholders are offered the opportunity to elect either cash or stock consideration so long as the cash, at the time it is first offered, is substantially equivalent to the value of the stock consideration offered and both options are offered to all stockholders. See Question 112.02 to the SEC's Compliance and Disclosure Interpretations, available at http://www.sec.gov/divisions/corpfin/guidance/13e-3-interps.htm; see also SEC Release No. 34-17719, 46 FR 22571 (April 20, 1981).

Schedule 13E-3 Disclosure Requirements

If Rule 13e-3 applies to the going private transaction, then the target issuer and each affiliate engaging in the transaction must file a Schedule 13E-3 in addition to any proxy statement or tender offer documents otherwise required to be filed. As a practical matter, the proxy statement or tender offer documents are usually prepared to include the additional disclosures required by Schedule 13E-3. The Schedule 13E-3 itself then merely incorporates the information contained in the proxy statement or tender offer documents by reference. If the Rule 13e-3 transaction involves a tender offer, then a stand-alone Schedule 13E-3 is not required if the parties file a combined statement on Schedule TO. There is a check box on the cover page of Schedule TO to indicate that the tender offer is a going private transaction subject to Rule 13e-3. See Instruction J of Schedule TO, 17 C.F.R. § 240.14d-100.

The key disclosures included in Schedule 13E-3 are Items 7, 8, and 9, which refer to Items 1013, 1014, and 1015 of Regulation M-A (17 C.F.R. § 229.1000 et seq.). These items must appear in the front of the proxy statement or offer to purchase in a "Special Factors" section. The disclosures relate to the purpose of the going private transaction, the process undertaken by the issuer's board of directors or special committee to negotiate the transaction, and the content of any fairness opinion received from the issuer's financial advisor and the analysis performed by the advisor to reach its conclusion. These disclosure requirements are discussed in further detail below. In general, the SEC reviews, and typically comments heavily on, disclosure documents related to going private transactions. Parties to a going private transaction should thus draft the Schedule 13E-3 and other disclosure documents not only to comply with the letter of the disclosure requirements but to anticipate SEC comments.

Item 7: Purposes, Alternatives, Reasons and Effects

Item 7 of Schedule 13E-3 requires disclosure of:

- the purposes of the going private transaction;
- any alternative transactions considered by the board or special committee and the reasons why they were rejected;
- the reasons why the going private transaction is being undertaken at this time; and
- the anticipated effects (including tax consequences) of the going private transaction on the issuer, its affiliates, and its unaffiliated stockholders.

See 17 CFR 240.13e-100; See also 17 CFR 229.1013.

In most situations, the primary reason for the going private transaction is that the acquiring party desires to have the entire risk and reward of the ownership of the corporation. The disclosure should provide a balanced view of the pros and cons of the going private transaction to all parties involved, particularly the unaffiliated stockholders. This is an art and not a science - thoughtful and careful drafting is necessary in order to disclose all material facts accurately and completely, while not providing a "roadmap" to plaintiffs' lawyers who might seek to exploit the disclosure or take it out of context for their own benefit.

Item 8: Fairness of the Transaction

Under Item 8 of Schedule 13E-3, the filing parties must describe the process of the issuer's board of directors or special committee in negotiating and evaluating the going private transaction and disclose the board or committee's ultimate conclusion regarding the fairness of the transaction to unaffiliated stockholders. The focus of this disclosure should be on the substantive and procedural fairness of the transaction.

Items to be addressed in this disclosure include:

- whether the subject company or affiliate filing the statement reasonably believes the transaction is fair or unfair to unaffiliated stockholders;
- if any director dissented to or abstained from voting on the going private transaction, including to identify the director and, if known, after making reasonable inquiry, the reasons for the dissent or abstention;
- the material factors considered in reaching the fairness determination and the weight given to each factor;
    - The actual ranges of net book value, going concern value, or liquidation value considered by a board in determining the fairness of a transaction should be disclosed when such values are considered by the issuer's board. If such values were not considered by the board, then the reasons for not considering them should be disclosed. See, e.g., Charles L. Ephraim, No-action letter from Division of Corporation Finance (September 30, 1987).
    - acts or negotiations involving material corporate transactions during the two fiscal years before the filing should be discussed — not just firm offers, which are specifically addressed in the instructions to Item 8. See Item 5 of 17 CFR 240.13e-100; See also 17 CFR 229.1005.
- whether a majority-of-the-minority (unaffiliated security holders) approval requirement is required in the transaction;
- whether any directors dissented or abstained from voting on the transaction and, if so, why;
- whether a majority of non-employee directors retained an unaffiliated financial advisor to negotiate the transaction or deliver a fairness opinion; and
- whether a majority of non-employee directors approved the transaction.

  See 17 CFR 240.13e-100; See also 17 CFR 229.1014.

Item 9: Reports, Opinions, Appraisals and Negotiations

Item 9 of Schedule 13E-3 relates to the content of the fairness opinion rendered by the board or special committee's financial advisor, as well as the analysis undertaken by the financial advisor to reach its conclusion. The disclosure should also include any other reports, opinions, and appraisals, whether written or oral, that the issuer received in relation to the transaction.

- With respect to each report, opinion, or appraisal received, the disclosure must include:
- the name of the advisor giving the report, opinion, or appraisal;
- the qualifications of the advisor giving the report, opinion, or appraisal;
- the method of selection used to obtain the advisor giving the report, opinion, or appraisal;
- any material relationships that the advisor has had with any of the transaction parties in the past two years and any such current relationships, and any compensation received or to be received as a result of such relationships; and
- specific details regarding the fairness analysis, including the procedures and methods used by the advisor to arrive at its conclusion.

  See 17 CFR 240.13e-100; See also 17 CFR 229.1015.

With regard to the fairness analysis, simple conclusory statements (e.g., "the transaction is fair to the unaffiliated security holders in relation to net book value, going concern value and future prospects of the corporation") will generally not be considered sufficient disclosure.

In addition, the SEC will typically require a summary of the projections that the issuer's management provided to the financial advisor or others in connection with the fairness assessment, since those projections will most likely have been used in the advisor's analysis. This summary is usually accompanied by extensive disclaimers regarding the inherent uncertainty of the projections and underlying assumptions. Deal parties should be prepared to provide the SEC with copies of ***all*** preliminary and final board books, investment banker presentations (the SEC staff's interpretation with respect to Schedule 13E-3 is much broader than the SEC staff's position with respect to unaffiliated transactions and, while generally, draft materials are not required to be filed, where the draft version differs materially in substance from the final written version, the SEC staff may take the position that such preliminary investment banker presentations and summaries of oral presentations should be filed), and similar documents prepared in connection with the transaction if requested to do so during the comment process. Note that any report or opinion received by the acquirer must also be disclosed, although acquirers typically do not ask their financial advisors for a fairness opinion unless stockholder approval of the transaction is required on the acquirer's side.

Filing Schedule 13E-3: Timing Considerations

When the Schedule 13E-3 must be filed depends on the structure of the going private transaction. For one-step mergers, the Schedule 13E-3 is filed at the same time as the preliminary or definitive proxy statement or information statement filed in connection with the transaction. For tender offers, the Schedule 13E-3 is filed as soon as practicable on the date the tender offer is first published or distributed to stockholders. For other going private transactions in which a proxy statement or tender offer documents will not be filed, the Schedule 13E-3 is filed at least 30 days before the first purchase of securities. See Instruction D. to Schedule 13E-3, 17 C.F.R. § 240.13e-100.

If the issuer will be taken private through a series of transactions, then the Schedule 13E-3 disclosure must be filed with respect to the first transaction, and amended with each subsequent transaction. For example, if the acquirer plans to buy shares of the issuer's stock on the open market and then launch a tender offer, then the Schedule 13E-3 should be filed prior to the market purchases, and then amended once the tender offer is launched.

Note that, under Rule 13e-3(f)(1)(i), the Schedule 13E-3 disclosure must be provided to stockholders no later than 20 days before the purchase of shares, stockholder vote, or other corporate action. See 17 C.F.R. § 240.13e-3(f)(1)(i). The rule thus imposes an effective 20-day waiting period on consummating a going private transaction.

Related Content

Practice Notes

- Public Merger Agreement Basics
- Tender Offers under Amendments to the Delaware General Corporation Law
- Tax Benefit Maximization in Mergers and Acquisitions
- Fiduciary Duties and Director Approvals in M&A Deals (DE)
- Stockholder Approval and Appraisal Rights in M&A Deals

Recent Developments

- Delaware Supreme Court Provides Clarity on MFW Compliance: Client Alert Digest

Checklists

- Going Private Transaction Timetable Checklist (Cash Merger without a First Step Tender Offer Transaction) (DE)
- Going Private Transaction Timetable Checklist (Merger with First Step Tender Offer Transaction) (DE)

Templates

- Board Resolutions Forming Special Committee

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Michelle Heisner is a member of the Firm's Global Corporate and Securities Practice Group. Michelle's industry experience includes clients in the energy, telecommunications, financial services, and technology sectors. Earlier in her career, Michelle worked as an M&A attorney at a leading global law firm at its offices in New York, Australia and Washington, DC.

Michelle focuses on clients with respect to a variety of types of cross border and US domestic acquisitions mergers and acquisitions, including majority and minority investments, share purchases, mergers and joint ventures. She also has significant capital markets experience.