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FIDUCIARY DUTIES, DEAL STRUCTURE CONSIDERATIONS AND SECURITIES DISCLOSURE OBLIGATIONS IN GOING-PRIVATE TRANSACTIONS

6/24/2016



The full article of the abstract below was published in Transaction Advisors. This

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This article provides a brief overview of going-private deal structures, fiduciary duties applicable to boards and controlling stockholders in going-private and related transactions, key considerations relevant to the timing and structure of such transactions, and important disclosure obligations deal participants should be aware of.

In the context of corporate dealmaking, references to “going private” more typically center on transactions in which management or a controlling stockholder, in many cases in cooperation with a financial sponsor, acquires the stake held by the public in the company.

Parties seeking to undertake a going-private transaction generally adopt one of two approaches: a (i) one-step merger and a (ii) two-step deal involving a tender offer followed by a back-end merger.

A one-step deal entails a “cash out” or “squeeze out” merger under which all of the company’s stockholders are required to exchange their shares for the transaction consideration. The two-step, tender offer structure may present timing, cost, and deal certainty advantages.

Any consideration of a going-private transaction should include that the likelihood of a challenge in court has historically been high, while such suits have markedly dropped off in recent months. Because of the real or perceived conflicts of interest intrinsic in the acquisition of stock by a company or its controlling person, companies, boards of directors and acquiring stockholders face a host of obligations under state corporate law, particularly fiduciary duties in types of transactions.

Through an evolving series of decisions, Delaware courts have held that, in certain going-private deals, the use of specified transaction techniques may allow the proponent to secure review under the less stringent business judgment rule as opposed to being held to an entire fairness standard.

Going-private transactions are typically initiated by (1) the board of directors or special committee initiating a sale process or (2) either a financial investor seeking to acquire the company with an insider support or by management or a significant stockholder who wishes to take the company private.

If senior leadership or a major stockholder intends to launch such a deal, they should consider the immediate ramifications, including: (i) the need (or desirability) to form a special committee; (ii) strategic and/or legal reasons to limit management involvement in the transaction process and limits on the flow of information to management (especially in light of Dole Foods); and (iii) possible reduction in the likelihood of strategic acquirors’ interest in the company.

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