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10 CONSIDERATIONS SPECIAL COMMITTEES SHOULD ADDRESS IN A GOING PRIVATE TRANSACTION

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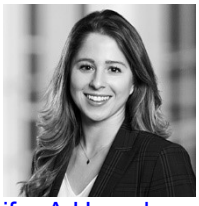

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Public issuers may choose to go private for several reasons. Among those most common may include the desire to minimize the time and costs affiliated with being a reporting issuer (audit, legal, transfer agent, stock exchange), the potential for greater fundraising activities, and the ability to close transactions faster. We have prepared this article to summarize ten (10) considerations that issuers, directors and special committee members should turn their minds to during a going private transaction.

Directors' Duties Generally and in Evaluating Major Transactions

Corporate law imposes requirements on the conduct of directors in respect of their supervision of the management of the business and affairs of a corporation. Each director of a corporation, when exercising his or her powers and discharging his or her duties, is required to act honestly and in good faith with a view to the best interests of the corporation (the fiduciary duty) and shall exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the duty of care and skill). If the actions of directors during a transaction unfairly disregards, or are prejudicial to, the interests of the corporation or stakeholders, then particular remedies might be available, including but not limited to oppression. Oppression is the most flexible power of the court, enabling it to grant any remedy that it finds "just and equitable" in the particular circumstances. Depending on the context, stakeholders generally include: shareholders, employees, creditors, consumers, governments and the environment, among others. While directors are expected to exercise a high degree of diligence, the standard that directors are required to meet is one of reasonableness, not perfection. Accordingly, courts often focus on the process that directors undertook to reach a decision, rather than the particular outcome itself. This concept is frequently referred to as the "business judgement rule".

A director's fiduciary duty is a broad and contextual concept that is expressly owed to the corporation itself. Sometimes the reasonable expectations of one or more stakeholders coincides with the best interest of the corporation, but not always. Accordingly, a director's duty to act in the best interests of the corporation requires him or her to treat individual stakeholders affected by corporate actions fairly and equitably, and to ensure that no interest of one stakeholder prevails over another. To this end, a special committee should be satisfied that a proposed transaction is fair to the corporation as a whole, and that it has not been structured to favour any particular group or stakeholder.

The following discussion provides a few considerations that issuers, directors and special committee members (when established) should turn their minds to during a proposed going private transaction.

Considerations Pertaining to a Going Private Transaction

We recommend that the following steps be taken in order to help the board of directors properly discharge its duties and responsibilities with respect to a proposed going private transaction:

1. As soon as practicable, the board of a directors should identify any potential or actual conflicts of interest that might be presented in relation to the proposed transaction.

   It is important that directors are not conflicted in respect of the proposed transaction. Multilateral Instrument 61-101 — *Protection of Minority Security Holders in Special Transactions* sets out certain circumstances in which a director will not be determined to be independent, including but not limited to: (i) if it is an interested party in the proposed transaction; (ii) if it currently, or was at any time during the 12 months before the date of the proposed transaction is agreed to, an employee, associated entity or issuer insider (other than his/her capacity as a director of the issuer); (iii) if it currently, or was at any time during the 12 months before the date of the proposed transaction is agreed to, an adviser to an interested party in connection with the proposed transaction; (iv) has a material financial interest in an interested party or an affiliated entity of an interested party; or (v) would reasonably be expected to receive a benefit as a consequence of the proposed transaction. The determination of whether a director is independent is a question of fact.

2. If conflicts are identified, the board should, and in some cases may be required, to create a special (independent) committee to review the proposed transaction.

   In addition to independence, special committee members should also have relevant expertise and experience, flexible schedules (to allow for appropriate deliberations), and the ability to work cohesively with the other committee members. Throughout its deliberations, independent committee members should consider the long-term interests of a corporation to determine what is in the corporation's best interests.

3. A broad and robust special committee mandate should be created and followed by the special committee.

   A broad and robust mandate is encouraged to help avoid any question of the efficacy of the special committee. Generally a special committee's role and mandate should include the following actions:

   a. the power to review, consider, supervise and negotiate the terms of the proposed transaction;

   b. encourage the specialcommittee to consider alternatives that may be available other than the proposed transaction (including maintaining the status quo, seeking other proposals and other available options to the corporation);

   c. to the ability to make recommendations regarding the proposed transaction, or if not, provide detailed reasons why no recommendations were provided; and

   d. to, and where considered favorable, hire its own independent legal and financial advisors without any involvement of, or interference from, interested parties or their representatives.

The court and securities regulators will generally be concerned with mandates that seek to limit the role of special committees.

4. Special committees should engage advisors to assist it throughout the decision making process, including when obtaining a formal valuation and/or a fairness opinion (if recommended or required) and appropriately consider the desirability or fairness of a proposed transaction.

   Special committees are reminded to exercise its own judgment as to whether the proposed transaction is in the best interests of the corporation, and that it must not merely rely on the opinion provided by advisors. Instead, a special committee should use the professional expertise to help guide it when making its own decision.

5. The special committee should insist on access to information, including but not limited to that relating to forecasts, projections and valuations, as well as information relating to the nature of arrangements between related parties and certain shareholders.

   Special committee members should also satisfy themselves that they have been presented with sufficient and accurate information to enable them to evaluate the proposed transaction and all matters ancillary thereto.

6. Special committees should be wary of coercive action that may be conducted by interested parties.

   It is critical that a special committee carry out its mandate and duties properly and free from undue influence, coercion or threats, whether express or implied and not succumb or otherwise acquiesce to any coercive tactics that may be presented.

7. Special committees should hold regularly scheduled meetings and keep members fully informed on any matters regarding the proposed transaction during the period between meetings.

   Courts and regulators may look carefully at the number, length and frequency of special committee meetings, as well as the attendance of each member. While it is permissible to invite non-independent directors and other persons possessing specialized knowledge to meetings of the special committee, such non independent directors and other persons should not be present at, or participate in, the decision-making deliberations of the committee.

8. Special committees should maintain accurate and complete records pertaining to its meetings and other activities.

   Among the considerations that these records should address include: the period of time spent on a particular topic and the duration of the meeting, the deliberations taken and any dissents that may have been raised, the issues discussed (including those specific to minority shareholders), the advice received and considered (including any professional appraisals, reports, valuations or expert opinions), and the decision(s) taken by the special committee. Such records could become the subject of intense scrutiny in the event of a regulatory or judicial investigation of the committee's work - particularly to assess whether the actions undertaken by the committee satisfy the fiduciary standards imposed upon directors as well as whether the interests of affected stakeholders was appropriately considered. Such records should therefore be complete and accurate, as well as include sufficient detail such that a third party can conclude that a deliberate and robust process was followed.

9. Sufficient time must be provided to the special committee when assessing the proposed transaction to enable its members to act in a carefully deliberate and informed manner.

   It is important that proper care be taken by a special committee in arriving at its decision(s). Accordingly, a special committee should have had sufficient time to properly internalize and discuss all available information, reports, interests (including of the various stakeholders) and reasonable alternatives to the proposed transaction, among others. Committee members are also encouraged to consider the reasonable expectations of others in light of commercial practices and realities.

10. Special committees should ensure that minority shareholders have access to, and that they actually receive, the necessary disclosure to allow it to make an informed decision when voting on a proposed transaction.

    We recommend that committees review disclosure documents to help ensure that discussions are meaningful and to encourage disclosure pertaining to: the review and approval process of the committee, the reasoning and analysis of the special committee, the views of special committee as to the desirability or fairness of the proposed transaction, and considerations to reasonable alternatives to the proposed transaction (including maintaining the status quo, financing sources, the potential sale of assets, and/or the likelihood of other offers).

Conclusion

It is important to remember that there is no "one size fits all plan" and that our recommendations may vary significantly depending on the particular facts at hand. In turn, we encourage you to contact either of the authors of this article if you are interested in learning more about the particular recommendations and steps that a particular issuer should follow in a proposed transaction.