# Client Alert

June 2020

## Take Private Transactions: A Strategic Option in the Midst of COVID-19 and a Volatile Energy Market

### Introduction

In today's uncertain times with a pandemic sweeping the planet, stock markets around the world in a seemingly perpetual state of volatility and an unprecedented global oil and gas crisis, there is increased interest and appetite for some public companies to go private. While the take private approach can be a viable strategic option in a down market, those who wish to proceed down this path should do so with caution because take private transactions are complex, have multiple federal and state law implications and will be scrutinized by courts and investors. For purposes of this memorandum, it is assumed that the target entity to be taken private is a Delaware corporation.

### Going Public vs. Going Private

Companies go public for a variety of reasons, including:

- increasing access to the public debt and equity capital markets;
- providing cash to pay down debt or for general corporate purposes;
- offering liquidity to sponsors, founders, management and other pre-IPO stockholders;
- delivering enhanced public presence, stature in the business community and market share;
- affording the ability to use stock as a form of acquisition currency;
- spreading the risk of ownership of the company to public investors; and
- providing line of sight on valuation of the company's securities.

Likewise, companies go private for myriad reasons, including:

- focusing management's attention on the company rather than on Wall Street's perception of the company;
- allowing a controlling stockholder to integrate its other businesses with the public company;
- eliminating concerns related to public stock price volatility;
- eliminating the possibility of a hostile takeover;
- realizing tax or accounting synergies; and
- reducing the overall regulatory burden of being a public company by eliminating costs associated with:
  - reporting with the United States Securities and Exchange Commission (the "SEC");
  - compliance with a national listing exchange like the New York Stock Exchange (the "NYSE") or the NASDAQ Global Select Market ("NASDAQ"); and
  - compliance with the Sarbanes-Oxley Act of 2002.

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**Going Dark vs. Take Private**

As a preliminary matter, it is worth addressing the differences between take private transactions and "going dark," because these terms are often conflated and this memorandum addresses only take private transactions. Going dark refers to a scenario where an issuer with fewer than 300 stockholders[i] delists from the NYSE, NASDAQ or similar listing exchange and deregisters its securities under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The result of the going dark transaction is the issuer no longer has public reporting obligations under the Exchange Act and its stock is no longer traded on an exchange or quoted in the over-the counter market, but it does not result in the concentrated ownership of a take private transaction.

**Transaction Structure**

*One-Step and Two-Step Mergers*

Take private transactions can involve controlled and non-controlled companies, and this memorandum addresses both scenarios even though the legal rules may vary. Take private transactions involve publicly traded companies and are typically accomplished in one of the following ways: (1) a controlling stockholder of the publicly-traded target company consummates the acquisition; (2) a private equity fund or third-party buyer partners with management to complete an acquisition in the form of a leveraged buyout; or (3) a non-controlling stockholder with significant ownership in the publicly-traded target company consummates the acquisition.

These transactions are generally structured as either a one-step or a two-step merger. A one-step merger (sometimes referred to as a "long-form merger") is typically structured so that the bidder's acquisition subsidiary merges with and into the target, and each outstanding share of the target is converted into cash. The target company must file a proxy statement with the SEC and mail it to stockholders. The merger usually must be approved by a majority of the target's outstanding shares, although the target's organizational documents or applicable state law (e.g., the holders of two-thirds of the outstanding shares of a Texas corporation must approve a merger) may require a greater vote.

A two-step merger is effectuated by a tender offer followed immediately by a second-step merger. Under Section 251(h) of the Delaware General Corporation Law (the "DGCL"), the bidder can immediately consummate the second-step merger if, among other things, it acquired a number of shares in the tender offer that would be sufficient to approve a merger (e.g., a majority) and each stockholder in the merger receives the same consideration offered in the tender offer.[ii]

In each of the foregoing transaction structures, the bidder typically presents its proposal to purchase the public company target, and following negotiations with the target company and approval by the target board of directors (the "Board") and/or a special committee of the Board (the "Special Committee") of such proposal, the parties enter into a merger agreement.

*Determining Controlling Stockholder Status*

As explained below, if the take private is effected by a controlling stockholder, different laws apply. As a result, it is important to understand what constitutes "controlling stockholder" status under Delaware law. As a general rule, in determining whether a stockholder is deemed to be a controlling stockholder, such stockholder must either "own a majority interest in or exercise control over the business affairs of the corporation."[iii] Whether a less-than-majority stockholder exercises sufficient control over the target to render it a controlling stockholder is a highly contextual analysis.

A stockholder that does not meet these requirements, however, may nevertheless be deemed to be a controlling stockholder if the stockholder along with other stockholders "acted as a single group" and "planned and caused" the transactions.[iv] To constitute a control group, the stockholders must be

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"connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work toward a shared goal."[v]

*Building a Competitive Bid Process*

In a take private transaction effected by a controlling stockholder, the target company may not have viable third-party alternatives, as the controlling stockholder may not be a willing participant in any such transaction. Nevertheless, it will be important for the Special Committee to discuss with its advisors the practicality of soliciting third-party alternatives and to assess the controlling stockholder's interest in supporting third-party transactions.

Outside the controlling stockholder context, the Board or Special Committee has a variety of options to discharge its fiduciary duties in obtaining the best price reasonably available for the stockholders, as further discussed below. This is typically done through a "market check." In some M&A transactions, the Board may choose to negotiate with a single bidder and then rely on a post-signing market check (sometimes referred to as a "window shop") in which the Board can respond to bona fide unsolicited proposals and exercise its "fiduciary out" to recommend a superior proposal prior to the stockholder vote or completion of the tender offer.[vi] In the take private context, however, Boards and/or Special Committees may opt to conduct a pre-signing market check (i.e., a sale process) or facilitate a post-signing market check through a "go-shop" process.

A "go-shop" refers to a provision in the merger agreement that allows the target Board to solicit alternative bids and freely discuss a transaction with any third-party buyer during a limited period of time.[vii] Delaware courts have held that an effective go-shop provision can promote a competitive bid process.[viii] The "go shop" provision must permit a meaningful opportunity for the target to search for higher offers, and the target typically commences the "go shop" process by including a reference to the "go shop" provision in the press release announcing the execution of the merger agreement with the take private bidder.

Each situation is unique and will require a contextual analysis of what it reasonable under the circumstances. In addition, the Board and/or Special Committee will need to consider the effect of various "deal protections" on the market check process, including matching rights, termination fees and termination rights.

*Fairness Opinion*

Those familiar with public company M&A understand the importance of a fairness opinion from an independent financial advisor (a "fairness opinion") in a transaction involving a stockholder vote. While not expressly required by law, obtaining a fairness opinion is highly recommended in any take private transaction. As addressed below, take private transactions can be the subject of litigation and will be scrutinized by the courts. While a fairness opinion does not immunize the transaction from litigation, it does assist the Board in its obligation to obtain "adequate information regarding the intrinsic value of the [c]ompany," and helps satisfy the Board's duty of care.[ix] A fairness opinion, however, will not shelter the Board or a Special Committee from "fraud, bad faith, or self-dealing, or proof thereof."[x]

**Judicial Review and Conflicts of Interest**

*Controlling Stockholder and Heightened Scrutiny*

A take private transaction with a controlling stockholder seeking to acquire the public company target presents a conflict of interest, generally. The controlling stockholder will owe certain fiduciary duties to minority stockholders while concurrently seeking to advance its own interests because it has determined that a take private transaction is in the best interests of such stockholder. To put it another way, the controlling stockholder stands on both sides of the proposed take private transaction.

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As is the case in any public merger scenario, the looming threat of litigation is always present, and the controlling stockholder merger take private transaction presents a target-rich environment for plaintiffs' attorneys. Additionally, absent efforts by the public company target to mitigate this conflict of interest, the courts will hold the target company to a heightened level of scrutiny, called the "entire fairness" standard of review, as opposed to the business judgment standard of review.[xi] Under the entire fairness standard, the court will review the transaction for "fair process" and "fair price."[xii] As discussed below, the parties can use certain procedural safeguards to avoid entire fairness or shift the burden of proving whether the transaction was fair.[xiii]

*Special Committees and Majority-of-the-Minority Vote*

Delaware case law[xiv] provides that the burden will shift to the plaintiff to prove the take private transaction by a controlling stockholder was not entirely fair if either (1) the transaction was approved by a fully-functioning Special Committee with full discretion to reject the proposed transaction or (2) the proposed transaction was conditioned on the non-waivable approval by a majority of the unaffiliated minority stockholders ("majority-of-the-minority"). The majority-of-the-minority vote must be fully informed and must not be coerced. If only one of these procedural safeguards is used, however, the standard of review will remain entire fairness.[xv]

The parties can avoid entire fairness by conditioning the transaction on the approval of both a Special Committee and a majority-of-the-minority vote. Specifically, "the business judgment standard of review will be applied *if and only if:* (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[xvi]

**Third-Party Acquisition**

Where a third-party buyer or a non-controlling stockholder proceeds with a take private transaction, the transaction typically will be subject to enhanced judicial scrutiny under *Revlon*. Although directors are always subject to the fiduciary duties of care and loyalty, their so-called *Revlon* duties in a change-of-control transaction require that they act reasonably to obtain the best price reasonably available for the stockholders under the circumstances.[xvii]

Conflicts of interest may arise where the target's management or directors participate in the take private transaction. Depending on the nature of the conflict of interest, the transaction could be reviewable under Delaware's entire fairness test. In some situations, it may be prudent for the Board to form a Special Committee to oversee the sale process and negotiations.[xviii] In certain circumstances (e.g., a take private led by a large stockholder), it may also be desirable to institute a majority-of-the-minority stockholder approval requirement.[xix] Even if there are conflicts of interest, however, the approval of the non-controlling stockholder's take private transaction by a majority of fully-informed and disinterested stockholders will invoke the protections of the business judgment rule, as further described below.

**Disclosure Obligations**

Navigating the disclosure landscape associated with a take private transaction is important for bidders and targets, alike. The disclosure landscape is contextual, technical and robust. Depending on the fact pattern, different filings may be required by federal and state securities laws, and it is paramount that the parties in a take private transaction understand the associated filings, timing, content and process requirements. Importantly, Rule 13e-3 of the Exchange Act ("Rule 13e-3") imposes heightened disclosure obligations on many take private transactions, as further described below.

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*Schedule TO*

In the context of a two-step merger, the bidder must file with the SEC a tender offer statement on Schedule TO[xx] ("STO") pursuant to the Exchange Act. The STO will appear on the SEC's electronic data gathering, analysis, and retrieval system ("EDGAR") and will be visible to the public like any other EDGAR filing. The STO must include the following:

- a term sheet summarizing the terms of the transaction;
- information about the target company, such as the name, address, frequency of dividends, prior public offerings and purchases of the target securities by the target company;
- identity and background of the offeror;
- the terms of the transaction;
- a description of any past contracts, transactions, negotiations and agreements;
- disclosure of the purposes, plans or any proposals;
- sources and amount of funds or other consideration of the offeror;
- a description of the offeror's ownership of target company's securities;
- a description of all persons to be employed or retained to make solicitations or recommendations in connection with the tender offer;
- a description of any officer or asset of the target company that will be employed or used in connection with the tender offer;
- certain financial statements; and
- additional information as may be required and certain exhibits.

*Schedule 14D-9*

Within ten business days after commencement of a tender offer, the public company target must file a Schedule 14D-9 on EDGAR with the SEC. The purpose of the Schedule 14D-9 is for the target company Board to provide a recommendation to its stockholders as to whether or not the tender offer should be accepted or rejected. Schedule 14D-9 requires the following:

- information about the target company, such as the name, address, frequency of dividends, prior public offerings and purchases of the target securities by the target company;
- identity and background of the offeror;
- a description of any past contracts, transactions, negotiations and agreements;
- a description of all persons to be employed or retained to make solicitations or recommendations in connection with the tender offer;
- a description of the offeror's ownership of target company's securities;

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- a description of the purposes and background of the transaction; and
- additional information as may be required and certain exhibits.

*Proxy Statement; Form S-4*

In situations where stockholder approval is required to consummate the transaction, the target company must file a proxy statement that complies with Regulation 14A and Schedule 14A under the Exchange Act. If the transaction structure involves a one-step merger as discussed above, then the company would need to file a proxy statement because stockholder approval is required. If securities are to comprise any portion of the merger consideration, then a Registration Statement on Form S-4 will need to filed with the SEC by the issuer of those securities along with the proxy statement.

Both proxy statements and Form S-4s require companies to disclose an extensive amount of information related to the target company, the acquirer, and the terms of the deal. Depending on the fact pattern of the transaction, the specific disclosure requirements vary. The purpose of Form S-4 is to produce a document that highlights the benefits of the transaction to the public company target stockholders and to protect the transaction participants from securities liability.[xxi]

*Schedules 13D and 13G*

Section 13(d) of the Exchange Act ("Section 13(d)") is a product of the Williams Act enacted in 1968 with the purpose of "providing for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934." The Williams Act was "passed . . . in response to the growing use of cash tender offers as a means for achieving corporate takeovers."[xxii] Later, pursuant to the Domestic and Foreign Investment Improvement Act of 1977 (the "DFIIA"), Section 13(g) of the Exchange Act ("Section 13(g)") was established to address passive investors with greater than 5% beneficial ownership in a given issuer.[xxiii]

Pursuant to Section 13(d), any person who indirectly or directly becomes the beneficial owner of more than 5% of an issuer's equity securities registered under Section 12 of the Exchange Act must file a Schedule 13D with the SEC within 10 days after the transaction. Schedule 13D requires the beneficial owner to disclose the following information related to its security ownership:

- background information related to the beneficial ownership of the investor;
- source and amount of funds or other consideration used in making the purchases;
- the purpose of the transaction;
- the number of shares of the security beneficially owned; and
- information related to contracts, arrangements, understandings, or relationships with respect to securities of the issuer.

Further, the beneficial owner must promptly file an amendment with the SEC if any statement filed in the Schedule 13D materially changes.[xxiv]

Pursuant to Section 13(g), a beneficial owner may file a short-form statement on the less onerous Schedule 13G in lieu of Schedule 13D if the beneficial owner qualifies as either:

- a "qualified institutional investor," under Rule 13d-1(b);
- a "passive investor," under Rule 13d-1(c); or

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- an "exempt investor," under Rule 13d-1(d).

The short form statement on Schedule 13G must include the following:

- such person's identity, residence, and citizenship; and
- the number and description of the shares in which such person has an interest and the nature of such interest.

The timing of the Schedule 13G filing depends on which category of investor the person qualifies for. A person that qualifies either as "qualified institutional investor" or "exempt investor" must file within 45 days after the end of the calendar year in which the person acquired beneficial ownership. A person who qualifies as a "passive investor" must file within 10 days after acquiring beneficial ownership. [xxv]

Even if a stockholder that proposes a going private transaction has previously filed a Schedule 13G (other than pursuant to Rule 13d-1(d)), it must file a Schedule 13D within ten days after it forms the intent to change or influence control of the target company. This Schedule 13D filing or amendment must disclose the acquiror's intentions, so it should preemptively consider its intentions before approaching the target company and triggering these disclosure obligations.[xxvi]

*Rule 13e-3*

Rule 13e-3 was enacted to address "the need for investor protection with respect to [take private] transactions" because "[t]he nature of and methods utilized in effecting going private transactions present an opportunity for overreaching of unaffiliated security holders by an issuer or its affiliates."[xxvii]

A "Rule 13e-3 transaction is any transaction or series of transactions involving one or more of the transactions described in paragraph (a)(3)(i) of Rule 13e-3 which has either a reasonable likelihood or a purpose of producing, either directly or indirectly" any of the following effects:

- "Causing any class of equity securities of the issuer…to become eligible for termination of registration under…or causing the reporting obligations with respect to such class to become eligible for;" or
- "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." [xxviii]

In addition to taking into consideration the effects of a transaction, Rule 13e-3 looks at the type of transaction, and the following transactions fall under the Rule 13e-3 regime:

- Purchase of any equity security by the public company target of such security or by an affiliate of such target;
- Tender offer for or request or invitation for tenders of any equity security made by the public company target of such class of securities or by an affiliate of such target; or
- Proxy or consent solicitation, distribution of information statements to, any equity security holder by the public company target of the class of securities or by an affiliate of such target, in connection with a merger or similar corporate transaction of the public company target or between such target (or its subsidiaries) and its affiliate; a sale of substantially all the assets of

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the public company target to its affiliate or group of affiliates; or a reverse stock split involving the purchase of fractional interests.

In determining whether a transaction constitutes a "13e-3 transaction" that will be subject to the heightened disclosure requirements found in Rule 13e-3, it is critical to understand (i) when a transaction is "engaged in" by the target or its affiliates and (ii) when a person is considered an "affiliate" of the target company. When a transaction is deemed to be "engaged in" has been the subject of interpretation for a number of years. Although there is not a clear definition, SEC guidance has provided several factors to consider in determining whether the Rule 13e-3 requirement exists, including "increases in consideration to be received by management, alterations in management's executive agreements favorable to such management, the equity participation of management in the acquiror, and the representation of management on the Board of the acquiror."[xxix] Rule 13e-3(a)(1) defines an "affiliate" of an issuer as "a person that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with such issuer." However, a stockholder may be an "affiliate" for purposes of Rule 13e-3 even if it does not meet the requirements to be a "controlling stockholder" under Delaware law.

If the transaction falls under Rule 13e-3, then Rule 13e-3 requires the filing of a Schedule 13E-3 (with all exhibits), amendments to such schedule reporting material changes and a final amendment to such schedule disclosing the results of the take private transaction.

The contents of the Schedule 13E-3 include:

- a term sheet summarizing the terms of the transaction;
- information about the target company, such as the same, address, frequency of dividends, prior public offerings and purchases of the target securities by the target company;
- identity and background of the offeror;
- the terms of the transaction;
- a description of any past contracts, transactions, negotiations and agreements;
- disclosure of the purposes, plans or any proposals and alternatives;
- a description of the fairness of the transaction, including any reports, opinions, appraisals from an outside party that is materially related to the Rule 13e-3 transaction and negotiations;
- a description of the offeror's ownership in target company's securities;
- a description of the solicitation or recommendation;
- a description of all persons to be employed or retained to make solicitations or recommendations in connection with the tender offer;
- certain financial statements; and
- additional information as may be required and certain exhibits as described below.[xxx]

The exhibits to the Schedule 13E-3 include:

- disclosure materials, including, but not limited to: tender offer materials, solicitation or recommendation, going private disclosure document, prospectus used in connection with an exchange offer;

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- any loan agreement referred to in the company's filing;
- any report, opinion or appraisal referred to in the company's filing;
- any document setting forth the terms of any agreement, arrangement, understanding or relationship referred to in the company's filing; and
- a description of the security holders' appraisal rights and the procedures for exercising those appraisal rights referred to in the company's filing.[xxxi]

*Delaware Law*

In addition to the disclosure requirements arising under federal securities laws, directors and officers of the target company have a duty under common law to disclose to the stockholders all material information reasonably available in connection with their decision to approve the transaction. Importantly, in a non-controller situation, the approval of a transaction by the vote a fully-informed majority of disinterested shareholders can invoke the protections of the business judgment rule.[xxxii]

**Parting Thoughts**

At the time of publication, many people are still working from home due to COVID-19 and the market continues to reflect a global decrease in demand for certain goods and services. Some resources, such as healthcare, are in high demand while other resources such as oil and gas and retail are facing the phenomena of substantially contracted demand and a supply glut. Much of the world is struggling, and many public companies are currently facing headwinds in the energy sector, the retail sector, the real estate sector and beyond. In the face of this struggle comes opportunity, and for some, the opportunity could take the form of a take private transaction.

In volatile times, prudence would dictate that interested parties apprise themselves of viable options going forward, and take private transactions are simply another potential way to deliver value to existing stockholders. Take private transactions require careful planning, often raise conflicts of interest that must be addressed and are not a one-size-fits-all approach, but take private transactions should be one of the options on the table for many companies in these unchartered times. For the reasons outlined above, the choice to take private may be a viable strategy to maximize stockholder value by delivering immediate cash to stockholders and allowing the business to pursue its long-term strategy as a private company, whether that is with the intent of generating continued, sustained growth without Wall Street chatter or whether it is with an eye towards an eventual liquidity event.

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[i] 17 C.F.R. Sec. 249.323.
[ii] *See* 8 Del. C. § 251(h). If the bidder obtains at least 90% of the outstanding shares entitled to vote on the merger, then it can effect a merger without a stockholder vote pursuant to Section 253 of the DGCL.
[iii] *See Ivanhoe Partners v. Newmont Min. Corp.*, Supreme Court of Delaware (November 18, 1987).
[iv] *Dubroff v. Wren Holdings*, *LLC*, Court of Chancery of Delaware (October 28, 2011).
[v] *Gilbert v. Perelman*, Court of Chancery of Delaware (April 29, 2020) (quoting *Dubroff v. Wren Holdings, LLC*, Delaware Chancery Court (May 22, 2009).
[vi] *See, e.g., In re Plains Exploration & Prod. Co. S'holder Litig.*, Court of Chancery of Delaware (May 9, 2013).
[vii] *In re Lear Corp. Shareholder Litigation*, Court of Chancery of Delaware (June 15, 2007).
[viii] *See, e.g., Dell v. Magnetar Global Master Fund*, Supreme Court of Delaware (December 14, 2017) ("The transaction process exemplifies many of the qualities that Delaware courts have found favor affording substantial, if not exclusive, weight to deal price in the fair value analysis."); *see also In re Appraisal of Solera Holdings, Inc.*, Court of Chancery of Delaware (July 30, 2018).
[ix] *Smith v. Van Gorkom*, Supreme Court of Delaware (January 29, 1985).
[x] *Smith v. Van Gorkom*, Supreme Court of Delaware (January 29, 1985).
[xi] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, Court of Chancery of Delaware (Oct. 2, 2009).
[xii] *Kahn v. Lynch Communication Systems, Inc.*, Supreme Court of Delaware (April 5, 1994); *In re Nine Systems Corporation Shareholders Litigation*, Court of Chancery of Delaware (September 4, 2014).
[xiii] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, Court of Chancery of Delaware (Oct. 2, 2009).
[xiv] *Kahn v. Lynch Communication Systems, Inc.*, Supreme Court of Delaware (April 5, 1994).
[xv] *Kahn v. Lynch Communication Systems, Inc.*, Supreme Court of Delaware (April 5, 1994).
[xvi] *Kahn v. M & F Worldwide Corp.*, Supreme Court of Delaware (March 14, 2014).
[xvii] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Supreme Court of Delaware (March 13, 1986).
[xviii] *See Salladay v. Lev*, Court of Chancery of Delaware (February 27, 2020).
[xix] *Kahn v. Lynch Communication Systems, Inc.*, Supreme Court of Delaware (April 5, 1994).
[xx] *See* 17 C.F.R. Sec. 240.14d-100.
[xxi] *See* 17 CFR § 240.14a-101; *see* also 17 CFR § 239.25.
[xxii] *Piper v. Chris-Craft Industries, Inc.*, United States Supreme Court (February 23, 1977).
[xxiii] *See* Section 13(g) of the Exchange Act; *see also* Section 201 of the DFIIA.
[xxiv] *See* Section 13(d) of the Exchange Act; *see also* Rules 13d-1 and 13d-101 of the Exchange Act.
[xxv] See Securities and Exchange Act of 1934, Section 13(g); *see also* Rule 13d-1 and 13d-102 of the Securities and Exchange Act of 1934.
[xxvi] See Rule 13d-1 of the Securities and Exchange Act of 1934.
[xxvii] SEC Release No. 34-17719, 46 FR 22571 (April 20, 1981).
[xxviii] 17 C.F.R. Sec. 240.13e-3(a)(3)(ii)(A-B).
[xxix] U.S. Securities and Exchange Commission, Going Private Transactions, Exchange Act Rule 13e-3 and Schedule 13E-3 (January 26, 2009).
[xxx] *See* 17 C.F.R. Sec. 240.13e-3.
[xxxi] *See* 17 C.F.R. Sec. 229.1016.
[xxxii] *See Corwin v. KKR Financial Holdings LLC*, Supreme Court of Delaware (October 2, 2015).

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