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The Next Wave: Going-Private Transactions

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With debut of the market sell-off in January, expected volatility in the coming months and valuation pressures on small-cap equities, it is reasonable to expect that boards of public companies may consider if there are sufficient advantages to remaining a public reporting company. Although the cost of going-private and the near certainty of litigation has been an historical deterrent, two fairly recent actions have set the stage for a more streamlined process.

First, Delaware courts issued several opinions on disclosure-only settlements. In particular, Chancellor Bouchard rejected the settlement negotiated with Zillow last year over its $3.5 billion takeover of Trulia for “supplemental disclosures” of information in exchange for a release of all claims stemming from the merger. With dimming hopes for easy settlement fees, plaintiffs’ lawyers are bringing fewer cases. Over the first nine months of 2015, 78 percent of Delaware companies that sold themselves faced at least one lawsuit there, according to a recent *Wall Street Journal* analysis. But, since Oct. 1, just 34 percent of mergers have been challenged. Thus, the first impediment —the cost of defending the inevitable lawsuit — has been mitigated.

The second action is the adoption in 2013 and the clarifying amendments in 2014 of Section 251(h), which permits a bidder and a public target company to conduct a back-end merger without a stockholder vote, even if the bidder does not attain 90 percent or more of the company’s stock in the front-end tender offer, so long as, among other requirements, the bidder obtains such number of the shares as would otherwise be sufficient to approve the merger. Thus, many of the impediments to “going-private” transactions, including obtaining financing without full-ownership and delays caused by the need for a stockholders’ meeting have been eliminated.

Bidders and target companies may consider going-private transactions for a variety of rationales, as illustrated in several examples from 2015. Note that, in addition to deal-specific reasons included below, eliminating the cost of public company reporting was cited in each transaction. Moreover, each was negotiated by a special committee, a widespread trend likely to remain prevalent.

In December 2015, the founding Anderson family and senior management of Books-A-Million, Inc. acquired full ownership of the company to increase management’s operating flexibility and reduce the short-term earnings focus according to public filings.

In April 2015, affiliates of Oaktree Capital Management acquired full ownership of Pulse Electronics Corporation, in which they held an approximately 69 percent stake in order to address liquidity constraints, including covering costs associated with turnaround efforts.

In March 2015, affiliates of Vector Capital acquired ChyronHego Corp., a broadcast graphics firm, in order to address competitive pressures and the need to engage in a strategic transformation of the company's products.

With the confluence of a volatile stock market, depressed valuations for technology companies, mitigation of litigation expense and a faster and clearer path to completion, you can expect going-private deals to increase in 2016.