THE MANAGEMENT BUYOUT

Considerations and Consequences of a "Going Private" Transaction
Part II : Regulatory and Other Considerations

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Although satisfying the fiduciary duties of the directors and finalizing the details in making the decision to go private are important first steps, it is critical to recognize that the process itself will be complicated, time-consuming and will almost certainly attract the attention of the staff of the SEC, which often has questions and comments throughout the entire process. Although the end result may make it worthwhile, it must be recognized that going private also can be expensive, since the company will typically incur its own legal and accounting fees as well as the fees of advisors to the special committee, which should be authorized to engage its own financial, legal and other advisors. The buyout group will also have its own outside advisers, which should be different from the firms advising the special committee and the company. The sheer number of personnel involved in a going private transaction, and the multiple interests represented, make drafting and negotiating documents a time-consuming process that becomes only more complex once the regulators become involved.

There are numerous other considerations that must be taken into account before attempting any going private transaction. State law, existing contractual commitments (particularly with lenders and creditors), federal antitrust issues and a company's charter and bylaws may significantly restrict, or even foreclose, a company's ability to go private. In addition, once a company files its going private documents with the SEC, the public market is on notice that the company is essentially for sale and others may decide to bid for the company (even if such bids are not solicited or even wanted). Since the board of directors – and particularly the special committee – has a fiduciary duty to achieve the best deal for the company, additional bids can sometimes become a significant obstacle in completing the MBO if another bidder presents a better alternative for the company's shareholders.

The SEC has established specific rules with which a company must comply during and after the entire going private process. Rule 13e-3 under the Securities Exchange Act of 1934 governs the mechanics of conducting a going private transaction. The disclosure required is very detailed and requires ongoing discourse with SEC staff regarding the public filings that are an intrinsic part of the going private process. The company must disclose, among other things:

- Whether and why the company believes that the transaction is fair to the existing shareholders of the company;
- The purposes and effects of the transaction and whether alternative strategies were pursued;
- The reasons for both the proposed structure and timing of the transaction;
- Whether the transaction will require approval of minority shareholders (i.e., non-management buyout group or "disinterested" shareholders);
- Whether the independent directors (or in most cases, the special committee) have retained outside legal counsel and/or an investment bank to negotiate on behalf of the disinterested public shareholders and opine as to the fairness of the transaction;
- Whether the transaction was approved by a majority of the independent directors or a special committee; and
- Whether the shareholders have appraisal or other rights under applicable state law.

The buyout group will also be required to make separate filings with the SEC once it acquires beneficial ownership of more than 5% of the company's outstanding stock, which usually occurs at a very early stage in any going private transaction. There are also filings that will need to be made with the national exchange or automated quotation system on which the company's securities are currently being traded. In addition, if the going private transaction involves a tender offer, there are other regulatory filings and considerations that will need to be taken into account by the company and the buyout group in connection with the transaction.

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All of these negotiations and filings can, and usually do, take months to complete (often substantially longer than a business combination involving unrelated parties) and typically require a significant time commitment from the board and management. The SEC (and, as a practical matter, the plaintiffs' bar) must be satisfied that the going private transaction is in the best interests of those shareholders who, once the transaction is consummated, will no longer have any stake in the private company or any say in how the newly private company conducts its business and affairs. A going private transaction, since it permanently eliminates a group of shareholders and removes the company from SEC oversight, is typically of great interest to the SEC because it is usually the last time that the SEC will have any effective means of regulating the company and protecting its shareholders. Needless to say, it can be a difficult process to see through to the end – particularly if the management group is not fully committed to the task.

Any broadcast management group that is considering a going private transaction should take a look at SEC filings made by other management groups, particularly those in the radio and broadcast industry. There is a wealth of information relating to deal structure, timing and financing arrangements that is available on the SEC's website, www.sec.gov.[1] Reviewing this information prior to initiating contact with outside financing sources can help you get a feel for the pros and cons of going private and whether there are recent transactions that might be similar to your particular situation.

Moreover, most management groups are typically unable to finance a going private transaction on their own and must look to third parties for funding. There are a number of banks and private equity firms that are knowledgeable about taking companies private,[2] as well as secondary resources that provide information about going private transactions and third-party financing.[3] These transactions are not "one size fits all," so it is important to consider your financing options carefully before engaging advisors and initiating the process. The *fatpitch* website illustrates there are a variety of strategies that can be used, depending on the particular circumstances of the company. Many of the venture capital, merchant banking and traditional banking firms that have been historical players in electronic media may be excited to find new opportunities with old business partners they lost to the public markets in past years. A list of those resources is beyond the scope of this article, but they are not difficult to find. Remember, the real challenge for the management group may not be obtaining the financing commitment, but rather holding everything and everyone together for the length of time that it takes to complete the going private transaction.

Concluding Thoughts

A going private transaction is not a simple process. It presents numerous procedural, substantive and regulatory challenges at both the federal and state level, as well as the not insignificant risk of shareholder litigation should the transaction be deemed to not be in the best interests of the company and its shareholders. It is a costly and prolonged process that must be undertaken only with the assistance of professional advisers who are experienced in such transactions. Nevertheless, for some public companies, going private may provide them with a better opportunity to maximize the revenue and grow the product and service side of the broadcasting business than otherwise would be the case in a difficult public financial market where investors may be coming to believe that enormous growth is no longer going to fuel more valuable stock prices. Under the right circumstances, it can be the first step in helping to unlock what management believes to be the true value of the company. Just as important, for broadcasting companies, going private can free management to look beyond the short-term horizon of the public securities market and allow it to focus its full-time attention on the important programming and operational matters that determine a broadcaster's ability to survive and compete in today's challenging environment.

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[1] For example, you can review the various schedules and documents related to the going private transaction initiated via a joint tender offer by Cox Holdings, Inc. (which is a wholly owned subsidiary of Cox Enterprises, Inc.) and Cox Communications, Inc. to purchase all of the issued and outstanding shares of Class A common stock of Cox Communications not owned by Cox DNS, Inc., another wholly owned subsidiary of Cox Enterprises, at:*http://www.sec.gov/cgi-binbrowseedgar?type=&dateb=&owner=exclude&action=getcompany&CIK =0000025305*.

[2] See, e.g., Jeffrey R. Manning and Fred S. Stovall, "Sarbanes-Oxley prompts more firms to go private," National Law Journal (May 23, 2005). Mr. Manning is senior managing director of FTI Capital Advisors LLC, the wholly owned investment banking subsidiary of FTI Consulting.

[3] The Internet is an excellent resource for researching deals. In addition to the SEC's website, there is at least one weblog currently dedicated to publishing and discussing news related to going private transactions. See *http://fatpitch.home.comcast.net/2005/05/going-private-transactions.html*

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