

Why are you a public company? Is it time to go private?

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By now, most directors of public companies have a fairly good understanding and appreciation of the new requirements being imposed on them and their company as a result of the Sarbanes-Oxley Act and the new, related rules of the Securities and Exchange Commission and the exchange on which their company's stock is traded. The requirements cover a broad range, including more expansive and rapid disclosure, heightened internal controls, increased role for shareholders in the nomination and election process, expanded responsibilities and potent liabilities for directors, and increased costs for compliance.

Given all of these new requirements and cost, it may be advisable for the CEO and directors of a small or micro market capitalization public company to re-examine exactly why it is a public company. Was it always a public company? Did it back into being one, never having the benefits of a true IPO? Does it need access to the capital markets to fund its operations and growth? Does it need its stock to acquire other companies? Is its public status necessary to provide an exit path for founding shareholders? Does it need equity-based compensation plans to attract and retain a quality work force? Is it disadvantaged by being a public company? Are the costs, such as accounting, legal and printing disproportionate to the size of the company? Is it too small to attract a meaningful following? Are its investor relations efforts ignored due to its size? Does its public disclosure of its segment results put it at a competitive disadvantage with its privately owned competitors who do not have to disclose their results? Does it have a hard time attracting and retaining qualified individuals willing to serve on its board? Can it find independent directors with the requisite financial background to serve on its audit committee? Has its stock price dropped to a level that threatens the company with de-listing from the exchange on

which it is listed? The answers to these questions may help to resolve the issue of whether your company should go private.

Preliminary questions

If you determine that it may make sense for your company to go private, what are some of the things you should study before committing to that course? While there is not one set way to go about such an inquiry, here are some points you should consider:

1. Who will lead the effort to consider taking the company private?
2. Can current management lead that effort or play a significant role in the effort? If so, do they have to resign their positions with the company prior to or during the process? If so, who will manage the company during the time it takes to complete the transaction?
3. If management is part of the group considering a going-private transaction, can they protect themselves financially by getting severance agreements or so-called "bust up" fees if another party tops their offer?

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4. Will starting the process of going private put the company "in play"?
5. At what point in the process must there be public disclosure?
6. At what point, if at all, must the Board consider seeking other offers or putting the company up for auction?
7. Can such a proposal be financed?
8. Is a leveraged buy-out (i.e., using the company's assets to finance the going-private transaction) possible?
9. What are the disclosure and SEC filing requirements?
10. Can the transaction be structured to avoid a shareholder vote?
11. Will a "fairness" opinion be required?
12. How long will such a transaction take and what will it cost?
13. How will the company's employees, customers, suppliers, and shareholders view the transaction?
14. Will there be legal issues to overcome, such as antitrust issues?
15. Does the deal "cash flow"?
16. And what is the "exit strategy" for the new owners?

Assemble an evaluation team

If you are interested in playing a role with the buyer group, here is a suggested roster of a "team" that can assist with the process:

- Key management members who can begin the detailed financial and operational study to determine if such transaction is prudent and achievable;
- Lawyers who are not otherwise affiliated with the company who will guide you through the maze of legal requirements;
- An independent investment banker who can advise you if such a transaction can be financed and who can locate and structure the financing;
- An investor relations professional who can analyze the company's current shareholder base and assist in determining whether the announcement of the deal will attract arbitragers;
- A benefits consultant who can both analyze the company's current benefit plans and design any new plans that would be advisable for the company once it is privately owned;
- An accounting firm to handle the financial accounting issues for the buying group;
- A list of individuals who would serve as new directors of the company after the deal closes;
- A spiritual adviser who will "guide" you through those long, hard nights when you have doubts about whether you have made the right decision to take the company in this direction.

If you are not in the buying group

Here are some steps that management and directors should consider taking if they are not part of the buying group:

- Appoint a special committee of disinterested directors to consider whether the company should even explore the idea of going private;
- Consider who will manage the company throughout the going-private process if senior management is going to be part of the buying group;
- Retain special legal counsel to advise the special committee;
- Retain an investment banking firm to advise the board and to give a fairness opinion if necessary;
- Retain an investor relations firm to assist the company with its public disclosure obligations and to arrange meetings with institutional investors and one-on-one meetings with significant investors, within the limits permitted by the SEC's disclosure rules such as Reg FD;

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- Assure that the company has adequate Director and Officer liability insurance and indemnification agreements;
- Institute a communication program to address the questions that will invariably come, not only from shareholders, but also employees, customers, suppliers, lenders, government agencies, and the communities in which the company operates, and to respond to the likely negative comments that the company's competitors will disseminate;
- Establish a budget for the deal and determine how it will affect the company if no deal is consummated;
- Be prepared for frequent and lengthy meetings throughout the process.

Before you begin on the long, costly, and uncertain path of considering whether your company should go private, it will be helpful to study why and how other companies undertook similar transactions and the outcomes of those deals.

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