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Financing the Take-Private of a US Company: Considerations for Lenders

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The year 2022 was a challenging year for mergers and acquisitions ("M&A") activity. Global M&A volume fell 37% from record levels in 2021,[1] driven in large part by a 35% decline in private equity sponsored buyout activity.[2] Bucking this trend, however, the volume of private equity-led "take-private" transactions – acquisitions by private equity sponsors of publicly-traded companies that delist upon consummation of the transaction – announced in 2022 surpassed 2021 levels.[3] As we enter 2023, many market participants have considered the combination of (relatively) depressed public equity prices and significant private equity dry powder and predicted that take-private activity will continue at a brisk pace.[4] Lenders providing financing for these transactions need to be aware of the ways in which a take-private acquisition differs from a private-to-private, and how these differences may affect the timing and certain terms of the financing. This chapter describes not only the unique M&A challenges for take-private acquisitions, but also how those challenges impact the related debt financing.

Background

Public company acquisitions are in most fundamental respects similar to those of private companies: the target undergoes a change of control, with the seller receiving cash, equity or other consideration from the buyer in return for transferring its ownership in and rights to future financial returns of the target. However, acquiring a publicly traded target presents a set of challenges for deal participants they do not confront with one that is privately held:

- Primary among these is the requirement to obtain transaction approval not only from the target's board of directors, but also from its dispersed shareholders. Obtaining shareholder approval in this context requires compliance with both complex federal securities laws as well as state laws governing the approval process, and this approval process often takes a significant amount of time to complete.
- Relatedly, disclosure obligations imposed by the Securities and Exchange Commission (the "SEC") and other regulatory bodies require deal participants to publicize the material terms of the transaction, including price, upon signing the deal and well in advance of its consummation. This disclosure enhances the topping bid risk inherent in acquisitions of public companies, including those in the form of a take-private. This "topping bid" or "interloper" risk – the possibility of the seller receiving a higher offer from a third-party bidder that emerges after the original acquisition agreement is signed – exists until the target shareholders approve the transaction. This risk is a distinguishing characteristic as compared to private company transactions, which typically provide for shareholder approval at the time the acquisition agreement is signed.
- Another wrinkle to acquisitions of public companies is that dissenting shareholders have the ability to exercise "appraisal" rights, described in greater detail below. While minority shareholders may exercise appraisal rights in take-private transactions, the exercise by these shareholders of this right rarely derails or significantly delays or impedes the acquisition. Nonetheless, the buyer in a take-private transaction, often a private equity buyer, needs to account for this remedy as it may result in a post-closing payment obligation of the acquired company.

As with private company acquisitions, take-private acquisitions are often financed with a mix of equity and debt. For funds certainty purposes, the debt component is routinely provided by financing sources on a committed basis, *i.e.*, debt financing sources will provide, at the time the acquisition agreement is signed, a firm commitment to finance a portion of the acquisition at its closing, subject to satisfaction of a limited set of conditions.

Overview of Take-Private Structures

Take-private acquisitions generally take the form of a "one-step" merger, which is typically structured so that the constituent entities to the merger are the target and a newly formed "shell" subsidiary of the buyer formed for purposes of effecting the merger. At closing, that shell merger subsidiary merges with and into the target, resulting in the target becoming a wholly-owned subsidiary of the buyer and the equity securities of the target held by the target shareholders prior to closing being cancelled in exchange for the right to receive the merger consideration (*i.e.*, the cash per share or other consideration offered by the buyer). If the acquisition involves debt financing, the financing is often incurred by the shell merger subsidiary so that the target itself will become the borrower under the financing upon the closing of the merger. The "one-step" merger requires the target shareholders to approve the merger, at which point the target may no longer terminate the agreement to accept a higher offer. An alternative way to structure a take-private transaction is through a "two-step" transaction, which is a tender offer by the buyer – typically though a newly formed "shell" subsidiary of the buyer – for the target shareholders' shares, followed by – assuming the tender of the requisite percentage of target shares – a merger of the shell subsidiary with and into the target, resulting in the target surviving as a wholly-owned subsidiary of the buyer, to "squeeze out" the target shareholders who do not tender their shares in the offer. While a two-step transaction can be completed in as few as 20 business days under SEC rules – faster than a one-step merger can generally be consummated given the timing requirements imposed by the solicitation process under SEC rules to solicit approval of the target shareholders for the

merger – this potential timing advantage is often inconsequential if (i) antitrust and other regulatory approvals are required and already mandate a longer timeline, and/or (ii) the acquisition financing sources are afforded time between signing and closing to negotiate definitive debt documents and syndicate the loans or bonds. As a result, many take-private buyers prefer the simplicity offered by a one-step merger transaction and the added transaction certainty offered by the fact that once the requisite shareholder majority has approved the merger, the right of the target board to terminate the merger agreement and accept a higher offer ceases. Target shareholder approval is not required in a "two-step" transaction, but interloper risk remains until the tender offer closes, which cannot occur until all antitrust and regulatory approvals have been obtained, which in some cases may take more time than the shareholder approval process for a "one-step" merger.

In any take-private acquisition – whether structured as a one-step merger or a two-step transaction – a buyer's key objective is to obtain full control of the target. But an ancillary, and important, benefit from the buyer's standpoint is that the consummation of a take-private transaction results in the target ceasing to be a public company, thereby eliminating the reporting and regulatory obligations imposed on it under the U.S. Securities Exchange Act of 1934, as amended, SEC regulations and stock exchange rules. Such delisting is accomplished by eliminating all third-party shareholders of the public company, such that the buyer obtains 100% of the target's equity securities.

Required Approvals

Delaware and other state law generally require that both the target's board of directors (and, sometimes, it is advisable that a special committee of the board do so) and its shareholders approve any change of control transaction as a condition to its consummation. One exception is the two-step transaction described above. Assuming the requisite percentage of target shareholders tender their target shares in the tender offer, target shareholder approval is not required. Obtaining target shareholder approval in a one-step, take-private acquisition is the feature that most distinguishes it from a private company acquisition. More specifically, the shareholders of a private target company typically approve any acquisition prior to (or shortly after) the parties execute the definitive acquisition agreement and, in many cases, there is certainty that such approval will be received, *e.g.*, through voting agreements. For a public company with a broad shareholder base, however, it is impractical for both logistical and confidentiality reasons, and in some cases, inadvisable for legal reasons (as discussed below), to obtain such prior approval. As a result, shareholder approval in such circumstances must be obtained after execution of the acquisition agreement, as a condition precedent to closing. The state law in effect where the target is organized will set the baseline for required shareholder approval of the merger – a majority under Delaware corporate law, for example – but the target's organizational documents may set a higher threshold or additional requirements. Once the requisite percentage of target shareholders approve the transaction, the vote is binding on all shareholders (subject to the appraisal remedy of objecting shareholders discussed below).

The timing of the shareholder approval solicitation process can pose challenges for all parties involved, including the providers of committed financing. This process commences with preparation by the parties of a merger proxy statement for dissemination to the target's shareholders, which is subject to review by the SEC. The proxy statement includes substantial disclosure relating to the merger – *e.g.*, the rationale for the transaction, a chronology of interactions between the target and the buyer leading up to the transaction, and a recommendation from the target's board of directors to approve the transaction – and notifies shareholders of a special meeting to vote on the transaction, with directions as to attending and voting at the meeting. The proxy statement is also generally available to the public, enhancing the risk of a competitor or other interloper making a topping bid.

If the SEC declines to review the proxy statement, target shareholder approval may be obtained in as little as two months from signing. If the SEC elects to substantively review the proxy statement, however, this comment process may add six to eight weeks – possibly more – to the shareholder approval timeline. Notwithstanding that the SEC has historically elected to review proxy statements in only a minority of one-step all-cash take-private transactions not involving affiliated parties, the shareholder approval process must be monitored in light of the anticipated closing timeline.

Combining the shareholder approval process with any applicable regulatory approval process requires the parties to carefully sequence and manage the multiple pre-closing workstreams to ensure a smooth closing. In particular, where the buyer is financing the acquisition with debt in the form of broadly syndicated loans (or high-yield bonds), the financing sources must stay abreast of these various workstreams and in close contact with the private equity buyer to ensure that loan (and bond) marketing and closing timelines are staged appropriately.

Topping Bid/Interloper Risk

Sales of privately-held companies tend to have a single seller (or concentrated group of selling shareholders) permitting buyers to "lock up" these deals by obtaining all requisite shareholder consents to the transaction at the time of signing, even if that involves drag-along or similar contractual shareholder arrangements. In take-private transactions, in contrast, it is generally not possible to obtain shareholder consent of the public company at signing, resulting in the interloper risk described above; *i.e.*, the possibility of a higher offer from a third-party bidder that emerges after the original acquisition agreement is signed. To address this risk, buyers may seek commitments – via "support agreements" or "irrevocable undertakings" – from large shareholders or insiders of the target to vote in favor of the transaction. However, due to a series of Delaware court rulings effectively holding that voting agreements that fully lock-up a transaction and preclude the target board from pursuing a higher and better offer may be invalid and unenforceable, many practitioners advise take-private transaction parties against securing more than 30–35% of the vote of shareholders under such agreements.

This interloper risk is inseparable from a consideration of the fiduciary duties of boards of directors, which are heightened for public company corporations given the broad base of shareholders and the increased risk of litigation. Under state law, boards owe fiduciary duties of care and loyalty to shareholders. Prior to the approval of the transaction by the target's shareholders, these fiduciary duties have been held to require a target board to retain the flexibility to appropriately consider later-emerging bids. If the board determines that a new bid is superior to the original bid, the board is required to recommend approval of the topping bid. The target board's right to change its recommendation in favor of a topping bid (and ultimately to terminate the original acquisition agreement) is typically subject to providing the initial bidder the right to match the topping bid, which usually must be exercised within a short period of time (*e.g.*, within five business days).

Public company acquisition agreements often include certain "deal protections" to regulate interloper risk, and these deal protections may impact both the length of time needed to close an acquisition and the certainty that the acquisition will be consummated as planned. "No-shop" provisions govern the solicitation by the target of bids from other potential buyers. These provisions restrict the target from soliciting bids from other potential bidders, but, consistent with a board's fiduciary duty to accept the best available deal, are usually subject to certain exceptions. The target may also ask for a "go-shop" provision in cases where the buyer and target agreed to the acquisition outside of a competitive auction process. Go-shop provisions allow the target to actively seek and negotiate an alternative transaction with a third party for a specified period of time (*e.g.*, 30 to 60 days) after the acquisition agreement is signed, following which no-shop provisions apply.

Another common deal protection is a break-up fee payable by the target to the initial bidder to compensate it for its lost opportunity cost and expenses if the acquisition agreement is terminated as a result of certain actions by the target, such as the target company's board changing its recommendation to shareholders to approve the merger or the target accepting another bid or consummating an alternative transaction within six–12 months of terminating the original acquisition agreement. The quantum of fees in this context typically range between 2% to 4% of the target's equity value. Fees larger than this are unusual, particularly where a transaction involves a Delaware target because Delaware courts have indicated fees in excess of this range may act as an inappropriate disincentive to boards and shareholders seeking higher, competing offers.

This extended and public process presents an existential risk to any related acquisition financing. In particular, a target's acceptance of a topping bid and consummation of the alternative transaction will result in the termination of debt financing commitments, as the transaction contemplated by the commitment – pursuant to the initial acquisition agreement – will no longer be consummated. Under these circumstances, a typical "alternative transaction fee" under debt commitment papers will not be triggered, though in some cases the financing sources will be entitled to a portion of any break-up fee (typically limited to the financing sources' out-of-pocket expenses) if one is paid to the buyer. Alternatively, the original buyer may itself top the interloper's bid, with the increased purchase price being financed at least in part with additional debt. The financing sources that provided the original financing package are under no contractual obligation to provide this additional debt, however, the buyer will of course be very likely to approach them to see if they are willing to do so.

Appraisal Rights

Target shareholders that object to the terms of a take-private transaction may vote against the merger or refuse to tender their shares into a tender offer. However, either form of objection by an individual shareholder (even a large one) could have a limited impact, if any, on the transaction moving forward given that most mergers may be effectuated by vote of a majority of the target's shareholders, and many tender offers can be successfully done if a majority of the target shares is tendered. Recognizing that individual shareholders in public company acquisitions may not have the ability to block a merger or influence the sale price, state law provides an "appraisal" rights remedy to dissenting shareholders. This remedy is intended to provide a dissenting shareholder (*i.e.*, a shareholder that votes against the merger or who does not tender into the tender offer and follows a statutory process for exercising this remedy) with "fair value" for its stock *in lieu* of the negotiated merger consideration. Such fair value is determined by an impartial court as of the merger date and on a stand-alone basis without deal synergies. Following consummation of the transaction, the court will determine the value of the dissenting equity, and after this determination the acquired company will be obligated to pay such judicially-determined value to dissenting shareholders, together with accrued statutory interest from closing.

There are many examples of debt commitment papers supporting take-private acquisitions that take into account appraisal right payments for purposes of the required minimum equity contribution condition. In particular, appraisal right payments that are subject to an equity commitment letter may be treated as equity for purposes of the required minimum equity contribution condition. In this context, an equity commitment letter is a letter agreement under which the private equity buyer commits, in favor of the acquired company, to make the appraisal payments to dissenting shareholders. In cases in which appraisal right payments subject to an equity commitment letter are given equity treatment, financing sources often seek contractual certainty under the definitive debt documents that the sponsor will fulfill such obligations under the equity commitment letter, including through an affirmative covenant or an event of default, upon a breach of such commitment. While these provisions are unique to debt financings supporting take-private transactions, as compared to private-company transactions, they are rarely if ever one of the key negotiated points in the acquisition financing.

Other Considerations

Shareholder litigation

Take-private transactions are often subject to class action lawsuits based on claims that the target's board breached its fiduciary duties in entering into the acquisition agreement or that insufficient disclosure was provided to shareholders. The substantial majority of these shareholder litigations are dismissed (or settled) before any preliminary injunction is granted. And, even where settled, plaintiffs often receive minor deal protection enhancements (along with their legal fees), which rarely impact the overall transaction or any financing supporting the acquisition.

Regulatory approvals

In addition to target shareholder approval, the closing of M&A transactions is also conditioned upon obtaining any required regulatory approvals, including foreign and domestic antitrust approvals, foreign direct investment approvals and industry-specific approvals. Following the issuance by President Biden of an executive order in July 2021 encouraging federal agencies to advance antitrust principles in a range of sectors, the Department of Justice and the Federal Trade Commission have increased the frequency and intensity of their review of pending M&A transactions. However, this change in posture is in no way unique to take-private transactions – it is a broader development in M&A transactions that impacts both private-company acquisitions and take-privates.

Due diligence

Consistent with acquisitions of privately-held companies, legal due diligence is required to be performed and finalized upon

signing take-private transactions. But a defining feature of a publicly-traded company is that a significant amount of information about the target company is publicly available through its SEC filings. In light of that, and the fact that expansive due diligence may increase the risk that the deal will leak prior to the announcement of an agreed transaction, target companies in take-private transactions are often less willing to provide a similar level of due diligence materials to the buyer's financing sources as compared to an acquisition of a privately-held company. As such, it is important for lenders and their counsel to undertake as thorough a diligence process as possible under the circumstances prior to signing, with the understanding that the available information may not be as complete as desired.

Conclusion

Lenders that provide financing commitments to support take-private acquisitions (and their advisors) should be aware of the considerations – set forth above – that distinguish an acquisition of a publicly-traded target from that of a private one. At a high level, a public shareholder base all but guarantees less deal closing certainty for the buyer and seller, and therefore for the related debt financing, at the time of signing an acquisition agreement. Perhaps more critical for financing sources is the increased pre-closing complexity in a take-private transaction caused by the shareholder approval process and, in a not insignificant number of deals, an actual or threatened topping bid, since those M&A workstreams may impact the process for finalizing and, in some cases, marketing the related debt financing.

Endnotes

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