

MERCER CAPITAL

# Fairness Considerations in Going Private Transactions

A (non-legal) Perspective for Directors of Micro- and Small-Cap Public Companies

**Jeff K. Davis, CFA**

Mercer Capital  
jeffdavis@mercercapital.com  
615.345.0350

December 2019

# Disclaimer

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This short presentation is intended to provide an overview of some issues surrounding a decision to take an SEC-registrant private. This presentation does not cover all issues with going private transactions; nor should it be construed to convey legal, accounting or tax-related advice. Companies considering such a move should hire appropriate legal and financial advisors.

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SECTION 1

# Pros and Cons of Going Private

# Going Private

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There are different paths to becoming a SEC-registrant: an IPO; spin-out from a public company; or expansion in the number of shareholders to more than 2,000 (500 prior to 2012) through a merger in which the consideration includes the issuance of common shares.

While there once may have been a good reason to be a public company (or not), that may no longer be the case: hence, consideration of a go-private transaction may be warranted.

Being an SEC registrant is expensive with significant accounting, legal, regulatory and investor relation costs. Plus, it can be difficult to make decisions that are best for the long-term success of the company when many public investors focus heavily upon quarterly results and expected earnings over the coming four quarters.

Also, trading volume may be disappointing, especially for micro-cap and small-cap companies that are not included in a major index such as the Russell 2000. Investor interest in the shares may be further hindered by limited or non-existent analyst coverage.

# Going Private

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With many micro-cap and small-cap stocks languishing, now may be a good time to consider a going private transaction. In order to “go dark” a company must have 300 or fewer shareholders.

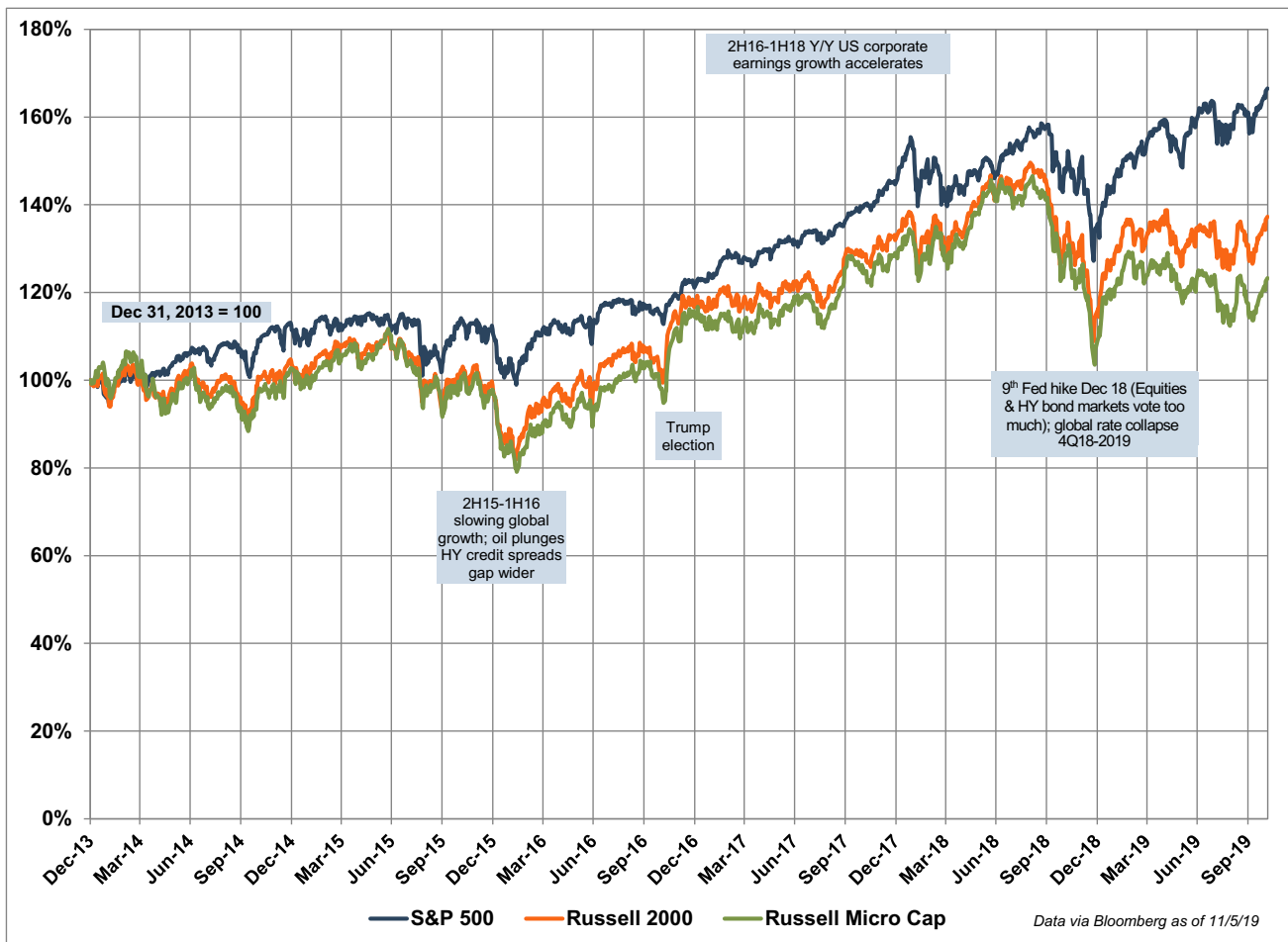
Generally, there are two types of going private transactions: (1) a controlling or significant but non-controlling shareholder seeks to acquire minority shares with or without board support; or (2) company management and the board seek to reduce the number shareholders in order to go dark.

Regardless of how and why a company seeks to go-private, Schedule 13E-3 must be filed with the SEC. Among other items, the schedule requires disclosure regarding the purpose of the transaction, terms, alternatives considered, and fairness of the transaction.

*The issuer and the affiliate are persons required to file the Schedule 13E-3, each must evaluate the going private transaction from the standpoint of fairness to the issuer’s unaffiliated shareholders and appropriately disclose the results of such evaluation. (<https://www.sec.gov/divisions/corpfin/guidance/13e-3-interps.htm>)*

# Russell Micro-Cap and 2000 Indices

Small- and micro-cap indices vastly underperform the S&P 500



Median and average market cap for small cap index \$736M / \$2.2B; micro cap \$220M / \$504M @ 9/30/19

Investors have favored large-caps with shift to passive from active management

Foreign capital flows to the U.S. often require liquid assets

Value stocks (vs. growth) are out-of-favor and are heavily represented among small caps

Regulatory changes have resulted in less analyst coverage of small companies

# Going Private

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## Pros

Reduce accounting, legal and compliance-related costs

No longer subject to Wall Street's myopic focus on quarterly results

Eliminate public disclosure of financial results and other important corporate matters to competitors

More corporate governance flexibility

Eliminate lawsuit potential related to SOX certification

Potential to use more leverage in the capital structure to obtain tax benefit

## Cons

Shares no longer listed on a national exchange (although some liquidity can be maintained via OTC listing)

Lose (or greatly diminished) ability to use shares as an acquisition currency

Less access to equity capital although depth of private equity capital today arguably mitigates



SECTION 2

# Structuring a Transaction

# Structuring a Transaction

## Reverse Stock Splits

The most direct route to going private is to execute a reverse stock split. Shareholders with more than a threshold number of shares will receive new shares, while those whose ownership is below the threshold amount will receive cash. In some instances a board may first institute a share repurchase program to avoid a reverse stock split if possible or reduce the number of shares that may dissent to a transaction.

The question for a board contemplating a go-private transaction via a reverse stock split: at what price will fractional shares be cashed-out?

Under §155 of the Delaware GCL, if a corporation seeks to compensate the shareholders instead of issuing fractional shares, it shall “(1) arrange for the disposition of fractional interests by those entitled thereto; (2) pay in cash their *fair value* as of the time when those entitled to receive such fractions are determined; or (3) issue scrip or warrants in registered or bearer form entitling the holder to receive a full share upon the surrender of such scrip or warrants aggregating a full share.” A cash payment is the most common outcome.

# Structuring a Transaction

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Section 155 of the DGCL addresses the right to receive fair value in a reverse stock split while §262 addresses the right of a Delaware stockholder to receive the appraised fair value in a transaction in which dissenters' rights are triggered (and perfected). Statutory fair value is not the same concept as fair value promulgated by the FASB for financial statement reporting purposes.

In Delaware, as elsewhere, statutory fair value has been interpreted by the judiciary. Fair value, in effect, represents value of the firm immediately before a transaction occurs without giving any consideration to merger synergies or changes in the capital structure that may occur; however, it also does not permit minority or marketability discounts as might be the case if the standard of value were fair market value (i.e., willing buyer, willing seller).

The essence of the appraisal process is to establish the value of that which has been (or will be) taken from dissenting shareholders. Establishing the price to cash-out shareholders in a go-private transaction for a company that is thinly traded merits intense scrutiny by the board or special committee because the shares may be undervalued based upon various valuation methodologies.

# Structuring a Transaction

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## Tender Offers and Mergers

The acquisition of minority shares by a controlling shareholder or significant non-control shareholder is more complex and raises more fairness-related issues for a board than a reverse stock split even though the end result is the same (i.e., certain minority shareholders are cashed-out).

In some instances the acquiring entity or individual(s) may first offer to acquire shares via a tender offer. The offer may be conditioned on the acquirer obtaining 90% of the shares so that a “short-form” merger can be executed in which the target is merged into the subsidiary (i.e., a parent-subsidary merger) without a shareholder vote. This process is known as a “two-step” merger because a backend merger immediately follows the tender offer.

Within ten days of a tender offer, the board must file Schedule 14D-9 with the SEC in which it recommends that shareholders accept or reject the offer; or, the board states that it takes no position. Also, for a tender offer not to be viewed as coercive, the acquirer must agree to a quick backend merger; cash out the remaining shares at the tender price; and not make threats (e.g. halt dividends).

# Structuring a Transaction

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If the acquiring shareholder or entity does not have a controlling interest, then the board or independent committee may be required to auction the company as part of its “Revlon” duties; or, at the very least run a limited market check with potential alternative acquirers in an effort to maximize value.

If the acquiring entity has a controlling interest, then an auction process likely is a non-starter because the controlling shareholder(s) will block a competing transaction by voting against it. In such an instance, it is more likely a single-step merger will be negotiated in which the board (presumably) will form a committee of disinterested directors who will hire legal and financial advisors to assist the committee in negotiating a merger agreement (“long-form”) with the acquirer.

Once approved by the board, the merger agreement is incorporated into a proxy statement that is sent to shareholders for approval at a special meeting of shareholders.

# Structuring a Transaction

## One-Step Merger

In a one-step merger, the target's board or special committee negotiates a merger agreement with the acquirer, which is then submitted to shareholders for approval via a proxy statement at a special shareholder meeting.

## Two-Step Merger

An acquirer, whether a control shareholder or not, launches a tender offer, often with the objective to achieve 90% or greater ownership so that the backend merger will be a short-form merger. A two-step merger can entail a long-form backend merger, however, unless a board that works with an acquirer grants a "top-up option" that allows the acquirer to buy enough shares to achieve 90% ownership.

## Long-Form Merger

A merger (agreement) that is negotiated and is subsequently submitted to shareholders for approval via a proxy statement.

## Short-Form Merger

A short-form merger, which also is known as a parent-subsidary merger, does not require a shareholder vote if the acquirer owns 90% or more of the target under Delaware law.

SECTION 3

# Valuation Analysis

# Valuation Considerations and Methods

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Regardless of whether a company that undergoes a go-private transaction has an active market for its shares or not (many small SEC registrants do not), a detailed valuation analysis has to be conducted to assess the reasonableness of the consideration to be paid (i.e., is the price fair?).

A critical element of the analysis is presented on page 19 in which the subject's historical and projected financial statements are analyzed to understand key trends, develop adjusted earnings for each year if applicable, and develop an estimate of ongoing earning power. An analysis of capex requirements and the balance sheet are required, too.

Valuation methods typically employed include:

***Market Premium Analysis*** - considers the premium paid for similar public companies that agreed to be acquired relative to the targets' public market price prior to announcement (usually calculated on a one, five, and 20-trading day volume weighted average) and applies the premiums to the market price of the subject provided a market exists for the subject company's shares. MPA has limitations, however, as premiums are a byproduct of an acquirer's valuation assessment of a target rather than a direct economic driver per se.



# Valuation Considerations and Methods

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**Guideline Transaction Method** - develops indications of value for the subject based upon multiples of EBITDA, EBIT, net income and the like as observed from acquisitions of companies within the same industry as the subject.

**Guideline Public Company Method** - develops indications of value for the subject based upon multiples of EBITDA, EBIT, net income and the like as observed from public market pricing of companies similar to the subject. To the extent the subject has an active market, then the GPC Method, in effect, is an assessment of whether the subject trades “cheap,” “rich” or inline with the public comps. To the extent the subject trades cheap or rich to the guideline companies, the analysis should address why.

**Discounted Cash Flow Method** - develops an indication of value based upon the present value of projected cash flows over a discrete time period (usually 3 or 5 years) and a terminal value at the end of the discrete period based upon the capitalization of a key metric such as EBITDA or NOPAT. Cash flows are discounted at a risk-appropriate discount rate. Also, a sensitivity analysis usually is incorporated to gauge the impact of varying discount rates, revenue growth rate, terminal value EBITDA, etc.

# Valuation Considerations and Methods

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***Present Value of Future Stock Price*** - derives an indication of value based upon a range of future earnings (management estimates and/or consensus analyst estimates), equity discount rates and forward P/E.

***Capitalization of Earning Power*** - derives an indication of value through the capitalization of a single measure of earning power (usually net operating profit after-tax, or NOPAT, which is derived from EBITDA less capex, incremental net working capital and taxes) via a capitalization factor (or multiple). The capitalization factor is derived from the subject's weighted average cost of capital less an assumed ongoing growth rate applicable to the earning power measure.

***Net Asset Value Method*** - develops an indication of value from the subject's balance sheet with assets and liabilities marked-to-market to the extent such values can be discerned (or approximated). The NAV method is constructed in the context of a going-concern (i.e., it is not a liquidation view). Also, the NAV method is most appropriate for asset holding companies rather than operating companies. Nonetheless, a fully developed valuation analysis should consider the method.

# Core Earnings Analysis

Core Earnings Analysis	Forecast	Budget	For the Fiscal Years Ended December 31					
	2021	2020	2019	2018	2017	2016	2016	2015
Units	1,502	1,474	1,445	1,390	1,321	1,223	1,267	1,221
x Average Price	\$9.60	\$9.65	\$9.55	\$9.50	\$9.35	\$9.20	\$9.25	\$9.00
Reported Revenue	\$14,419	\$14,224	\$13,800	\$13,205	\$12,351	\$11,252	\$11,720	\$10,989
Adj (1) Acme Surcharge	0	0	(120)	(150)	(175)	0	0	0
<b>Adjusted Revenue</b>	<b>\$14,419</b>	<b>\$14,224</b>	<b>\$13,680</b>	<b>\$13,055</b>	<b>\$12,176</b>	<b>\$11,252</b>	<b>\$11,720</b>	<b>\$10,989</b>
Reported Cost of Sales	9,286	9,160	8,846	8,438	7,670	7,145	7,395	6,868
Adj (2) None	0	0	0	0	0	0	0	0
Adjusted Cost of Sales	9,286	9,160	8,846	8,438	7,670	7,145	7,395	6,868
<b>Adjusted Gross Profit</b>	<b>5,133</b>	<b>5,064</b>	<b>4,834</b>	<b>4,617</b>	<b>4,506</b>	<b>4,107</b>	<b>4,325</b>	<b>4,121</b>
Reported Operating Expense	2,550	2,550	2,425	2,448	2,295	2,225	2,115	2,025
Adj (3) Facility Closure	0	0	0	(90)	(15)	0	0	0
Adj (4) Litigation Expense	0	0	0	0	0	(35)	0	0
<b>Adjusted Operating Expense</b>	<b>2,550</b>	<b>2,550</b>	<b>2,443</b>	<b>2,358</b>	<b>2,280</b>	<b>2,190</b>	<b>2,115</b>	<b>2,025</b>
<b>Adjusted Operating Income</b>	<b>2,583</b>	<b>2,514</b>	<b>2,391</b>	<b>2,259</b>	<b>2,226</b>	<b>1,917</b>	<b>2,210</b>	<b>2,096</b>
Reported Other Inc/(Exp)	(530)	(530)	(450)	(410)	(370)	(360)	(350)	(345)
Adj (5) Loss/(Gain) on Asset Sale	0	0	(95)	(75)	50	120	(20)	65
Adjusted Other Inc/(Exp)	(530)	(530)	(545)	(485)	(320)	(240)	(370)	(280)
<b>Adjusted Pre-Tax Income</b>	<b>\$2,053</b>	<b>\$1,984</b>	<b>\$1,846</b>	<b>\$1,774</b>	<b>\$1,906</b>	<b>\$1,677</b>	<b>\$1,840</b>	<b>\$1,816</b>
+ Interest Expense	477	477	405	369	333	324	315	311
<b>Adjusted EBIT</b>	<b>2,504</b>	<b>2,434</b>	<b>2,229</b>	<b>2,123</b>	<b>2,221</b>	<b>1,983</b>	<b>2,137</b>	<b>2,109</b>
+ Depreciation & Amortization	720	710	690	660	620	560	590	550
<b>Adjusted EBITDA</b>	<b>\$3,224</b>	<b>\$3,144</b>	<b>\$2,919</b>	<b>\$2,783</b>	<b>\$2,841</b>	<b>\$2,543</b>	<b>\$2,727</b>	<b>\$2,659</b>
Reported Capital Expenditures	790	780	760	730	680	620	640	600
<b>Adjusted EBITDA less CapEx</b>	<b>\$2,434</b>	<b>\$2,364</b>	<b>\$2,159</b>	<b>\$2,053</b>	<b>\$2,161</b>	<b>\$1,923</b>	<b>\$2,087</b>	<b>\$2,059</b>
Adjusted EBIT Margin	17.4%	17.1%	16.3%	16.3%	18.2%	17.6%	18.2%	19.2%
Adjusted EBITDA Margin	22.4%	22.1%	21.3%	21.3%	23.3%	22.6%	23.3%	24.2%
YY Revenue Growth	1.4%	4.0%	4.8%	7.2%	8.2%	-4.0%	6.6%	
YY EBIT Growth	2.9%	9.2%	5.0%	-4.4%	12.0%	-7.2%	1.3%	
YY EBITDA Growth	2.5%	7.7%	4.9%	-2.0%	11.7%	-6.8%	2.6%	

Every company is unique; however, an analysis of historical and projected results over the next few years is critical to:

- Identify key trends
- Exclude unusual and non-recurring items to derive adjusted (or core) earnings for each period
- Develop ongoing earning power

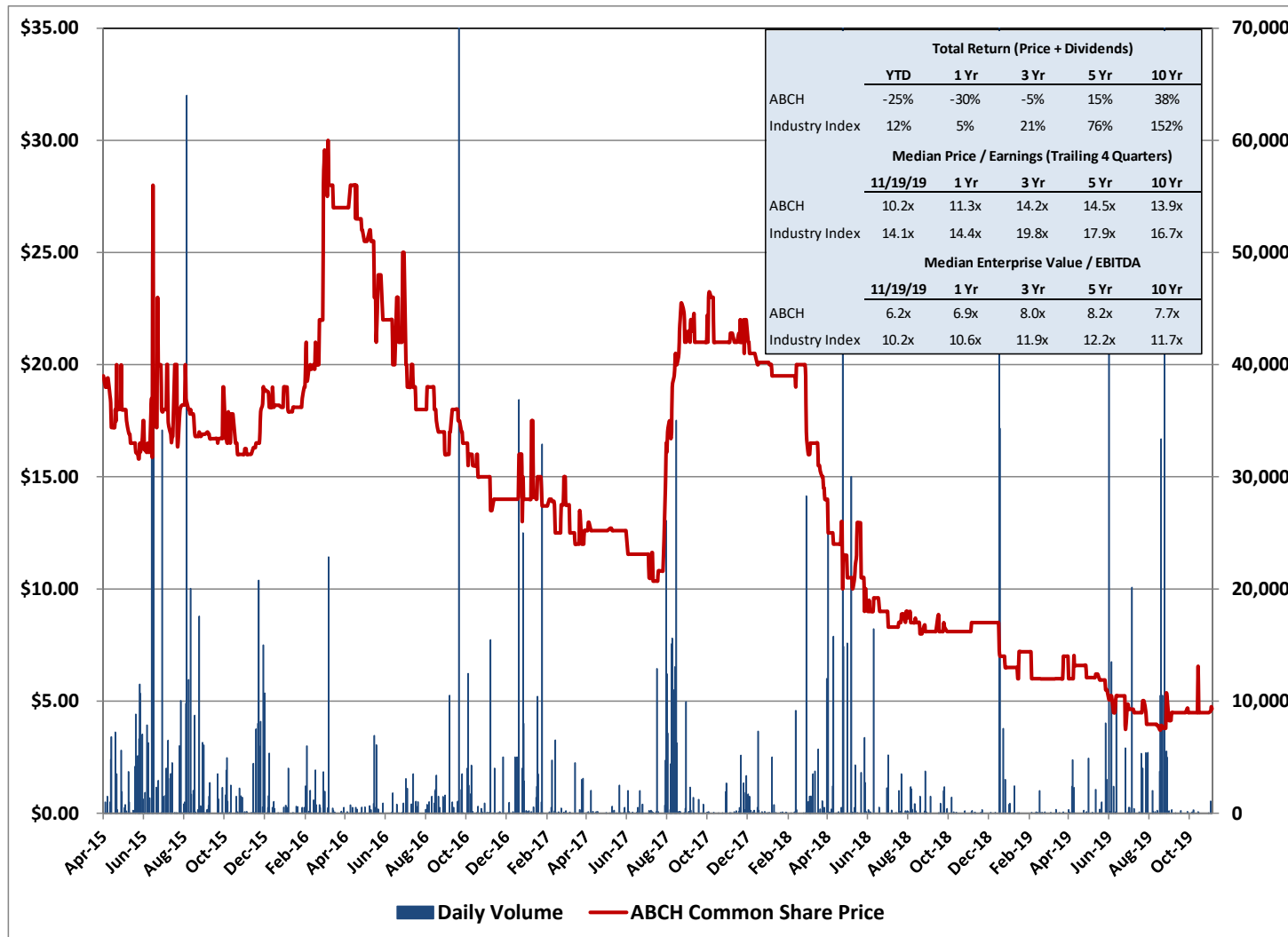
Earning power represents a base earning measure that is representative through the firm's (or industry's) business cycle

# Balance Sheet Analysis

	9/30/19	Adj	Pro Forma	Sources	
Cash	50	(25)	25	\$500M Revolver / Drawn	275
Accounts Receivable	124		124	Term Loan B	300
Inventories	114		114	6.75% Unsecured Notes	557
Other Current Assets	30		30	Excess Cash	25
Net Fixed Assets	1,575		1,575		\$1,157
<b>TOTAL ASSETS</b>	<b>\$1,893</b>	<b>(\$25)</b>	<b>\$1,868</b>	Uses	
				Existing Drawn Revolver	275
Accounts Payable	104		104	Tender for 9.25% Notes	582
Other Current (ex-CMLTD)	255		255	<b>Share Repurchase</b>	<b>300</b>
Revolving Credit Facility	275	0	275		\$1,157
Term Loan B	0	300	300	Multiples	
Project Financing	125		125	Enterprise Value / EBITDA	9.5x
Capital Leases	24		24	Pro Forma EV / EBITDA	9.3x
Total Senior Secured Debt	424		724	Total Debt / EBITDA	3.7x
5.50% Sr. Notes due 2021	582	(582)	0	Pro Forma Debt / EBITDA	4.7x
6.75% Sr. Notes due 2029	0	557	557	EBITDA / Interest Expense	5.8x
Total Senior Unsecured Debt	582		557	Pro Forma EBITDA / Int Exp	3.9x
<b>Total Debt</b>	<b>1,006</b>		<b>1,281</b>		
Total Liabilities	1,365	275	1,640		
<b>Equity</b>	<b>528</b>	<b>(300)</b>	<b>228</b>		
<b>TOTAL LIABILITIES &amp; EQUITY</b>	<b>\$1,893</b>	<b>(\$25)</b>	<b>\$1,868</b>		

Although a fairness analysis will focus on the price paid and process employed to cash-out minority shareholders in a go-private transaction, it is nonetheless critical for the board, special committee and their advisors to have a full understanding of the post-close balance sheet—especially to the extent significant leverage is employed to finance a transaction in which not all minority shareholders are cashed-out.

# Historical Price - Volume Analysis



# Market Premium Analysis

Close Date	Target	Buyer	Enterprise Value (\$M)	1-day Prem	1-wk Prem	1-Mon Prem
Jun-11	America Service Group Inc. (NasdaqGS: ASGR)	Valitas Health Services, Inc.	250	49%	48%	51%
Jan-12	HealthSpring Inc. (NYSE:HS)	Cigna Corporation (NYSE:CI)	3,860	37%	40%	57%
May-12	Access Plans, Inc. (OTCBB:APNC)	Affinity Insurance Services, Inc.	69	18%	20%	24%
Dec-12	AMERIGROUP Corporation (NYSE:AGP)	Anthem, Inc. (NYSE:ANTM)	4,626	43%	41%	47%
May-13	Coventry Health Care Inc. (NYSE:CVH)	Aetna Inc. (NYSE:AET)	5,727	20%	30%	31%
Feb-15	Protective Life Corp	Dai-ichi Life Ins Co, Ltd	5,580	20%	35%	37%
Mar-16	Health Net, Inc. (NYSE:HNT)	Centene Corp (NYSE:CNC)	6,282	21%	21%	28%
Mar-16	StanCorp Financial Group Inc. (NYSE:SFG)	Meiji Yasuda Life Ins Co	5,006	48%	47%	46%
Apr-17	Universal American Corp. (NYSE:UAM)	WellCare (NYSE:WCG)	600	12%	27%	32%
Nov-17	Fidelity & Guaranty Life	CF Corp / FGL US Holdings	1,835	8%	11%	11%

## Transaction Statistics

Maximum	\$6,282	49%	48%	57%
Median	\$4,243	21%	32%	34%
Average	\$3,383	28%	32%	36%
Minimum	\$69	8%	11%	11%

## Indicated Value Per Share

	1-Day	1-Week	1-Month
Median Premium Paid (per above)	21%	32%	34%
ABCH Volume Weighted Price	\$4.90	\$4.85	\$5.28
<b>Indicated Value Per Share</b>	<b>\$5.91</b>	<b>\$6.42</b>	<b>\$7.09</b>

SECTION 4

# Fairness Considerations

# Fairness

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A board's fiduciary duty to shareholders is encapsulated by three mandates:

- Act in good faith;
- Duty of care (informed decision making); and,
- Duty of loyalty (no self-dealing; conflicts disclosed).

Directors are generally shielded from courts second guessing their decisions by the *Business Judgement Rule* provided there is no breach of duty to shareholders. The presumption is that non-conflicted directors made an informed decision in good faith. As a result the burden of proof that a transaction is not fair and/or there was a breach of duty resides with the plaintiffs.

However, the burden of proof shifts to the directors if it is determined there was a breach of duty. If so, the decision will be judged based upon the *Entire Fairness Standard*—i.e., fair price *and* fair dealing.



# Fairness

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Fairness as an adjective means what is just, equitable, legitimate and consistent with rules and standards. As it relates to transactions, fairness is like valuation in that it is a range concept: transactions may not be fair, a close call, fair or very fair.

Fair price, whether viewed from the perspective of the *Business Judgement Rule* or *Entire Fairness Standard*, addresses the economics of a transaction. Fair dealing examines the process, examining such issues as:

- Who initiated the transaction?
- Who negotiated the transaction?
- What alternatives did the board consider?
- If shopped, who did the shopping?
- Did the board or special committee hire counsel and a financial advisor?
- What efforts were taken to improve any offer(s)?
- Did the board/committee have sufficient time to review the information?
- Are there agreements that might be seen as shifting value from shareholders to management and directors (e.g., new/richer employment agreements)

# Fairness

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In order to avoid an actual or perceived breach of loyalty, boards are usually advised to form a special committee of disinterested and independent directors to negotiate a transaction. In this context, disinterested means no interest in the transaction, or the same as the minority shareholders. Independent references no relationship with an interested party to the transaction that could impact the directors' decision making (e.g., familial relationships, past business ties, etc.).

The committee should be free of influence from conflicted board members and/or management and have free reign to hire independent counsel and financial advisors.

Support that a transaction meets the entire fairness standard also is provided if an informed majority of the minority shareholders approve the transaction without any coercion (e.g., threat by a controlling shareholder to cease making dividend payments).

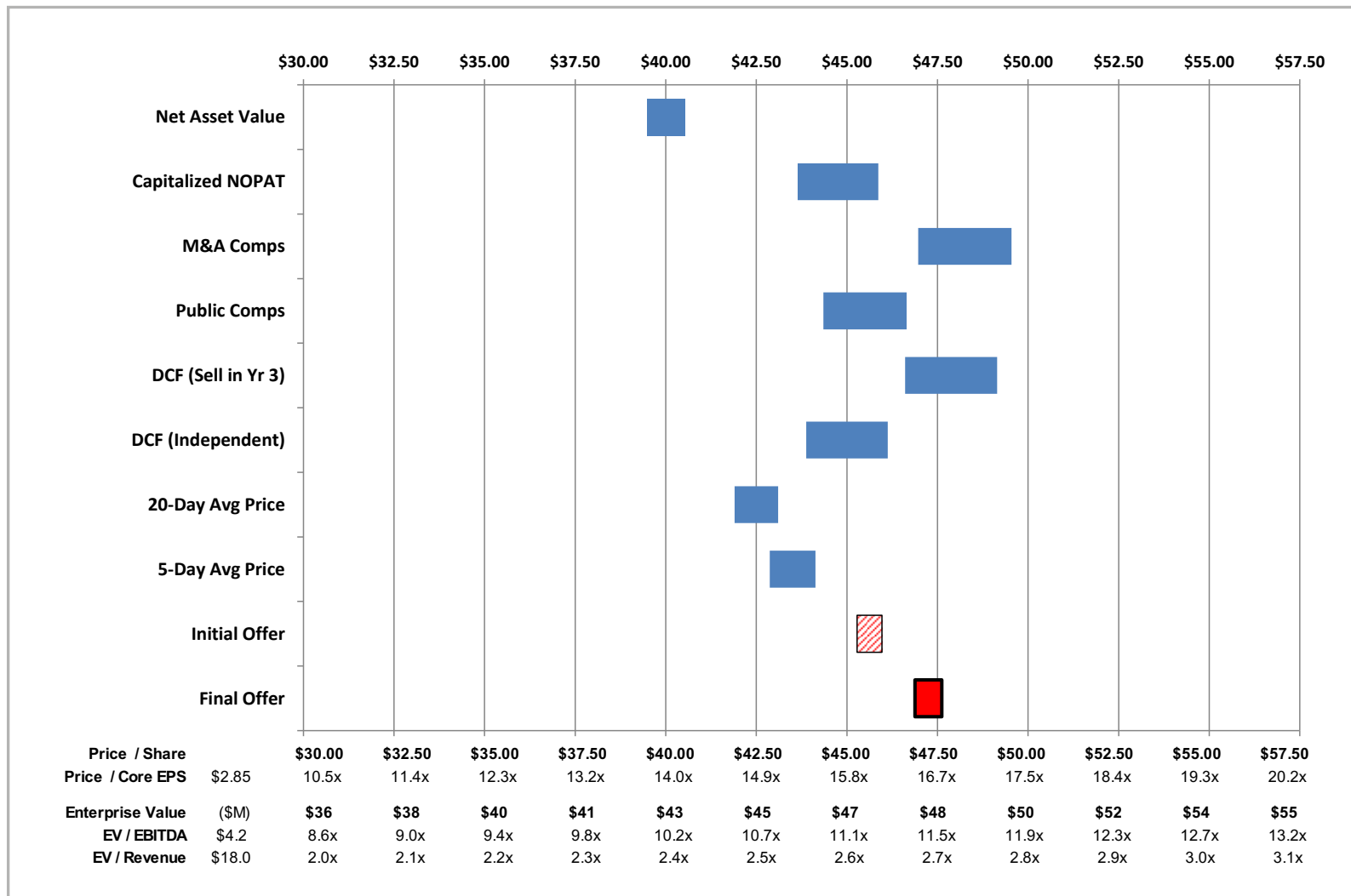
Fairness is subjective, but a good defense is a transaction that provides for consideration to be paid that is demonstrably fair.

# Process Timeline

Procedures Followed by the Board Resulted in .....



# Range of Value



SECTION 5

# Appendix

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# Growth and Margin Perspective

	<i>Historical Growth Rates</i>				<i>Projected Growth Rates</i>		
	5-Year	3-Year	1-Year	2019	1-Year	3-Year	5-Year
Revenue	5.4%	4.7%	4.4%	\$13,680	3.8%	4.5%	5.7%
Pretax Income	9.4%	7.9%	6.3%	\$1,846	4.2%	5.3%	6.7%
EBIT	10.9%	8.3%	7.2%	\$2,229	4.8%	6.1%	7.4%
EBITDA	11.4%	9.1%	7.5%	\$2,919	4.9%	6.3%	7.6%
EBITDA - CapEx	3.3%	0.0%	-5.0%	\$2,159	5.0%	5.9%	7.2%
Rev / Subscription	0.8%	0.4%	0.1%	\$9.50	-0.2%	0.0%	1.0%
Subscriptions	5.0%	4.5%	4.3%	1,445	4.0%	4.5%	5.0%

	<i>Historical Average Margins</i>				<i>Projected Average Margins</i>		
	5-Year	3-Year	1-Year	2019	1-Year	3-Year	5-Year
Gross Margin	30.4%	29.8%	29.0%	29.0%	28.6%	29.2%	29.5%
EBITDA Margin	24.7%	24.5%	23.4%	23.4%	23.1%	23.2%	23.7%
EBITDA - CapEx	20.3%	19.7%	19.4%	19.4%	18.3%	18.6%	19.1%
EBIT	21.4%	20.9%	20.3%	20.3%	18.8%	19.2%	19.7%

*This table is inserted in this presentation because the outlook for growth and margin can be a source of contention when examining fair value, and having a summary facilitates comparison of the history vs projection*

# Jeff K. Davis, CFA

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**Jeff K. Davis, CFA**  
[jeffdavis@mercercapital.com](mailto:jeffdavis@mercercapital.com)

615.345.0350 (O)  
615.767.9490 (M)

Managing Director – Financial Institutions Group (FIG) at Mercer Capital

Provides financial advisory services primarily related to the valuation of privately held equity and debt issued by financial services companies and M&A advisory and representation

S&P Global Market Intelligence (previously SNL Financial) contributor  
“Nashville Notes”

Previously a sell-side analyst covering commercial banks and specialty finance companies for Guggenheim Partners, FTN Financial and J.C. Bradford & Co.

FINRA registered rep with StillPoint Capital (CRD #4007205; Series 7, 63 and 79)

Rhodes College (BA); Vanderbilt University (MBA)

# Mercer Capital

1.800.769.0967

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