HOULIHAN CAPITAL

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Fairness Opinions: Going Private vs. Going Dark

Public companies are required to comply with United States Securities and Exchange Commission (SEC) filings and regulations. On average, public companies can spend anywhere from $1million to$3 million per year more than similar private companies due to regulatory and financial reporting costs. Studies have shown that public companies spend more on investor relations personnel, board costs and, most significantly, costs of compliance with the SEC (quarterly and annual filings, Form 8-Ks, etc.).

In addition to reduced annual costs, there can be substantial benefits to going private or going dark, including reduced personal liability associated with certifying financial statements, less stringent corporate governance requirements, and lower public disclosure (e.g., executive compensation or sensitive business information).

A going private transaction is when the public company or an affiliate of the Issuer ("Issuer") acquires all of the outstanding shares of common stock of the Issuer. Federal SEC rules and State law issues need to be addressed before going private. Generally, however, in a going private transaction, the Issuer:

- Delists its shares from exchange or NASDAQ;
- Deregisters its shares with the SEC; and
- The minority shareholders are cashed out.

A going private transaction is typically accomplished via merger, tender offer, or a reverse stock split. A key factor is that it requires cash to effectuate the transaction.

Going dark may be a viable alternative for many public companies. Going dark, in general, applies when the Issuer with less than 300 record holders voluntarily ceases to be a SEC reporting company:

- Issuer delists shares with exchange or NASDAQ;
- Issuer deregisters shares with the SEC;
- No change in shareholder base;
- No requirement to raise cash to fund a buyout transaction.

In either a going private or going dark transaction, obtaining a fairness opinion from an independent advisor is considered best practice. Lawyers and other advisors stress the importance of a fairness opinion as a shield against shareholder dissension. The main purpose of a fairness opinion is to determine whether the terms of a deal are fair to the shareholders – particularly minority shareholders. Further, in either transaction, Rule 13e-3 of the Securities Exchange Act of 1934 will apply. Rule 13e-3 imposes additional disclosure requirements on mergers, tender offers, asset sales, and other acquisition transactions, and specifically, in going private transactions, requires the filer to state whether it reasonably believes that the transaction is fair or unfair to unaffiliated shareholders.

For more information, please contact:

info@houlihancapital.com