

Proposed Amendments to Delaware General Corporation Law Could Streamline Process for Acquiring Public Companies Incorporated in Delaware

The Delaware State Bar Association recently proposed amendments to the Delaware General Corporation Law (“DCGL”) that, if adopted by the state legislature, could significantly alter the way acquisitions of Delaware public companies are effected¹. If adopted, the new provision would take effect for merger agreements signed on or after August 1, 2013. Proposed new Section 251(h) provides that, unless required by its certificate of incorporation, a public company² incorporated in Delaware is not required to obtain a shareholder vote to effect a merger if an acquirer obtains in a tender offer that percentage of shares that would have been needed to adopt the merger agreement. Other conditions that must be met are:

- the merger agreement must provide that the merger is governed by Section 251(h) and that the merger shall be effected “as soon as practicable” following consummation of the tender offer,
- the tender offer is for any and all of the outstanding shares entitled to vote to adopt the merger,
- at the time the board approves the merger the other parties to the merger agreement do not include an “interested stockholder,” essentially a holder of 15% or more of the shares,
- the entity that consummates the tender offer merges with or into the target, and
- all shares converted in the merger must receive the same consideration as was received for the tendered shares.

Most public company acquisitions are accomplished through a merger which requires a shareholder vote at a special meeting called for that purpose. Compliance with the proxy rules, including the preparation and dissemination of proxy materials, is required to solicit the shareholders’ vote. As an alternative, to avoid the delay and cost involved in conducting a special shareholder meeting and soliciting proxies, transactions are sometimes structured using a two-step process that involves a tender offer for any and all shares followed by a merger. The two-step process raises some particular challenges. First, unless the acquirer is able to purchase more than 90% of the target’s shares in the tender offer and effect a short form merger under Section 253 of the DGCL, to effect the second step merger, a shareholder vote at a special meeting and compliance with the proxy rules is still required. This second step delays the closing of the transaction and thus adds closing risk and cost to the deal. Further, in the two-step process, obtaining financing may be more difficult as lenders traditionally do not want to fund a tender offer unless the second step merger occurs immediately thereafter so the borrower has full control over the target and its assets as soon as possible.

In response to these legal and business issues, the market convention that has arisen, and which has been validated by the Delaware courts³, is for the target to grant a so-called “top-up option” to the acquirer. The top-up option gives the acquirer the right to acquire a sufficient number of shares of the target to meet the 90% needed to effect the second step merger without a shareholder vote. The top-up option, however, is not always available as

¹ Available at

http://www.rlf.com/files/6631_Final%20%28PDF%29%20version%20of%20Corp%20%20Council%202013%20Amendments%20to%20DGCL%20with%20Synops%20%20%20.pdf, at pdf page 8.

² For this purpose, a public company is a company whose shares are listed on a national securities exchange or are held of record by more than 2,000 holders.

³ See *Olson v. EV3, Inc.*, C.A. No. 5583-VCL (Del. Ch. Feb. 21, 2011).

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the target may not have a sufficient number of authorized but unissued shares available to it to issue to the acquirer or it might have to comply with stock exchange rules requiring a shareholder vote approving issuances in excess of 20% of the outstanding shares. The adoption of Section 251(h) would eliminate the need for a top-up option and allow the second step merger to close immediately following the closing of the tender offer.

While only time will tell how acquirers and targets, the Securities and Exchange Commission, the plaintiffs' bar, shareholders and advisers will react, Section 251(h) of the DGCL, if adopted, could lead the way for tender offers to become the method of choice for acquiring a Delaware public company.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

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