

Certain Recent Amendments to Delaware Law Affecting Mergers and Acquisitions

I. Springing Director and Shareholder/Consents

A practical issue often confronted in preparing to close an acquisition is the need to gather, in advance of closing, signatures of persons who will become directors or shareholders at the time of, or after, closing. Recent focus on a 1999 Delaware case had raised concerns among practitioners about the validity of such signatures obtained in advance. As of August 1, 2014, changes to Delaware General Corporation Law (“DGCL”) Sections 141(f) and 228(c) clarify that signatures obtained in advance of a person becoming a director or stockholder, may become effective at a future time (not to exceed 60 days), including upon the occurrence of a future event. These changes codify the common practice used to facilitate the closing of many acquisitions.

II. DGCL Section 251(h) Mergers

Section 251(h) of the DGCL, adopted in August 2013 provides that following a tender offer in which a majority of the outstanding stock of a target is acquired a second step merger can be affected without any further stockholder vote.

Recent amendments to the DGCL, effective August 1, 2014 (the “2014 Amendments”), address various questions and practical issues that have arisen in the past year as practitioners have implemented the new §251(h) merger provision.¹

1. Interested Stockholder limitation. Section 251(h) provided that it was available only if no interested stockholder was a party to the Merger Agreement. The limitation made it difficult for any corporation with a 15% or more stockholder to take advantage of §251(h) and created uncertainty around the impact of entering into voting agreements or lock-ups with stockholders owning 15% or more of a target’s stock. The 2014 Amendments remove the limitation completely.
2. Ownership of stock after tender offer is consummated. Section 251(h) required that, following the tender offer, the offeror must “own” the amount of stock required to approve the transaction. The 2014 Amendments address questions that arose regarding what it means to “own” the shares by requiring instead that the stock has to have been “irrevocably accepted for purchase or exchange” and have been “physically received” by the depository or an agent’s message being received by the depository in the case of uncertificated shares.
3. Contractual requirement to effect merger under §251(h). Transactions effected since adoption of §251(h) have often provided for merger either by use of §251(h) or, alternatively, other available statutory methods. As originally enacted, in order to take advantage of §251(h), the section required the merger agreement to provide that the merger “shall be” governed by §251(h). The 2014 Amendments clarify that the merger agreement may “permit or require” the merger to be effected under §251(h), thereby clarifying that the merger agreement may provide for flexibility to use alternative statutory provisions as appropriate.

¹ The text of the bill in which the amendments are highlighted is available at [http://legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB+329/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB+329/$file/legis.html?open)

4. Tender for any and all outstanding stock. Section 251(h) required the tender offer to be for “any and all outstanding stock” with no exceptions. The 2014 Amendments codified the common practice of excluding from the tender offer shares already owned by the offeror or the constituent corporations. The 2014 Amendments further clarify that the shares that are not subject to the tender offer are also not required to be converted into the right to receive an amount equal to the tender consideration.

III. Statute of Limitations: Breach of Contract

Under Delaware law the statute of limitations for a breach of contract action is three years. While Delaware law allows the parties to an agreement to shorten that period, parties could not extend the period except for certain “specialty contracts” that were executed “under seal,” an unclear process under Delaware law. An amendment to Delaware Code Section 8106, effective August 1, 2014, specifically permits the parties to any contract involving at least \$100,000 to agree to a longer limitation period not to exceed 20 years, thereby providing practitioners the flexibility to negotiate survival periods for breaches of representations, warranties or covenants in excess of a three year period.

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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; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.