



California Corporate & Securities Law

California's Fairness Opinion Requirement For Interested Party Proposals

September 26, 2011 By Keith Paul Bishop

In 1968, Congress enacted the Williams Act to regulate tender offers. Two decades later, the California legislature enacted Corporations Code Section 1203 to impose additional requirements on tender offers and other specified transactions by an "interested party".

Interested Parties

An "interested party" is a person (Section 18) who is a party to the transaction and who:

- Directly or indirectly controls (Section 160) the subject corporation;
- Is, or is directly or indirectly controlled by, an officer or director of the subject corporation; or
- Is an entity in which a material financial interest (Section 310(a)) is held by any director or *executive* officer (as defined in Section 1203(a)) of the subject corporation.

Covered Transactions

In addition to tender offers, Section 1203 applies to:

- "share exchange tender offers" (Section 183.5); and
- written proposals for approval of a reorganization (Section 181) subject to Section 1200 or for the sale of assets subject to Section 1001(a).

Fairness Opinion

Section 1203 requires the delivery of an affirmative, written opinion as to the fairness of the consideration to the shareholders. The required opinion must be delivered by a person who is not affiliated (Section 150) with the offeror and who for compensation engages in the business of advising others as to the value of properties, businesses or securities. The fact that the opining person has previously provided services to the offeror or a related entity or is simultaneously engaged in providing advice or assistance with respect to the proposed transaction in a manner that makes its compensation contingent on the success of the proposed transaction does not for those reasons deem the opining person to be affiliated with the offeror.

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Exceptions

Notably, Section 1203 does not apply to an interested party proposal if the subject corporation does not have shares held of record by 100 or more persons (determined in accordance with Section 605) or if the transaction has been qualified under either Section 25113 (qualification by permit for issuer transactions) or Section 25120 (qualification by permit for reorganizations) and no stop order is in effect.

Later Proposals

Section 1203 also imposes a requirement that the shareholders be informed and given a reasonable opportunity to withdraw their votes or tendered shares if a later tender offer or other written proposal for a covered transaction is made at least 10 days prior to the date for acceptance of the interested party proposal.

Application To Foreign Corporations

Because Section 1203 is part of Chapter 12, it is applicable to foreign corporations (Section 171) that are subject to Corporations Code Section 2115.

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