



California Corporate & Securities Law

Want A Fairness Hearing But Paying In Cash – No Problem?

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In yesterday's post, I mentioned California Corporations Code Section 1001(d). That statute imposes a super-majority shareholder approval requirement for sale of assets transactions covered by Section 1001(a) when the acquiring entity is in "control" of or under common control with the corporation disposing of the assets. The vote required is 90% of the voting power of the disposing corporation. "Control" means the ownership directly or indirectly of shares or equity securities possessing more than 50% of the "voting power" (defined in § 194.5) of a domestic corporation, foreign corporation, or an other business entity. Cal. Corp. Code § 160(b). An "equity security" is any share or membership of a domestic or foreign corporation; any partnership interest, membership interest, or equivalent equity interest in an other business entity; and any security convertible with or without consideration into, or any warrant or right to subscribe to or purchase, any of the foregoing". Cal. Corp. Code § 168.

There are two exceptions to this requirement. The first exception is when the disposition of assets is to a domestic or foreign corporation or other business entity in consideration for the non-redeemable equity securities of the acquiring party or its parent. Note that while Section 1001(a) expressly states that transactions constituting a reorganization (including a sale-of-assets reorganization) are not subject to Section 1001, it expressly excepts Section 1001(d).

The second exception is when the Commissioner of Corporations (or the Commissioner of Financial Institution, Insurance Commissioner, or the Public Utilities Commission) has approved the terms and conditions of the transaction and the fairness of those terms and conditions pursuant to Corporations Code Section 25142 (or other specified statutes in the case of the other specified regulators). But what if the transaction is a cash sale? On the face of the statute, there should be no problem. Section 25142 authorizes the Commissioner of Corporations to hold a fairness hearing when an application is made for a permit "to issue securities or to deliver other consideration (whether or not the security or transaction is exempt from qualification or not required to be qualified)".

For more on fairness hearings, see my article: *California Fairness Hearings: A Low-cost Alternative to Federal Registration in Acquisition Transactions*, 15 Insights 23 (Feb. 2001).

Please contact **[Keith Paul Bishop](#)** at Allen Matkins for more information kbishop@allenmatkins.com

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