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SEC/CORPORATE

Proposed Amendments to Delaware General Corporation Law and Courts and Judicial Procedure Law

Proposed amendments to the Delaware General Corporation Law (DGCL) are being considered by the Corporation Law Section of the Delaware State Bar Association. If approved by the Corporation Law Section and the Executive Committee of the Delaware State Bar Association, the proposed amendments will be considered by the Delaware legislature. The effective date for the proposed amendments would be August 1, 2014.[1] *Corporate and Financial Weekly Digest* will provide updates as the proposed amendments move forward.

DGCL Section 251(h) - Back-end Mergers in Two-step Transactions

In 2013, the DGCL was amended to include DGCL Section 251(h), which provides that a vote of a target corporation's stockholders is not required to authorize a back-end merger following a tender or exchange offer if: (1) the merger agreement expressly provides that the merger will be governed by Section 251(h) and that the second-step merger will be consummated as soon as practicable following the offer, (2) the acquiror consummates the offer for any and all of the outstanding stock of the target corporation that would otherwise be entitled to vote on the adoption of the merger agreement, (3) following the consummation of the offer, the acquiror owns at least the percentage of the stock of the target corporation that otherwise would be required to adopt the merger agreement, (4) at the time the target corporation's board of directors approves the merger agreement, no other party to the merger agreement is an "interested stockholder" (as defined in Section 203(c) of the DGCL) of the target corporation, (5) the acquiror merges with the target corporation pursuant to the merger agreement and (6) the outstanding shares of the target corporation not canceled in the merger are converted into the right to receive the same amount and kind of consideration paid for shares in the offer.

Since its enactment, a number of transactions have been consummated under Section 251(h), but questions remain regarding the application of the statute, and there are several significant limitations on its application. The proposed amendments to Section 251(h) are designed to address some of those questions and limitations.

The proposed amendments to Section 251(h) would, among other things:

- eliminate the prohibition on using Section 251(h) in a transaction involving an interested stockholder, which would remove any question regarding the permissibility of voting agreements, tender and support agreements and rollover agreements in transactions utilizing Section 251(h);
- clarify that an acquiror is deemed to "own" shares irrevocably accepted for purchase or exchange pursuant to the offer and actually received (and not shares tendered by notice of guaranteed delivery and not yet delivered) by the depositary prior to the expiration of the offer, and all shares otherwise owned by the acquiror;

[1] A number of important prior amendments to the DGCL, including the amendment adopting DGCL Section 251(h) in 2013, were proposed to the Delaware legislature by the Corporation Law Section.

- permit treasury shares or shares of the target owned by the acquiror or its affiliates at the commencement of the offer to be treated differently than shares that are the subject of the offer;
- require that the merger agreement expressly provide that the back-end merger will be effected as soon as practicable after completion of the offer; and
- permit the target corporation and the acquiror to provide for a “dual track” structure in the merger agreement (i.e., the parties may abandon a two-step transaction in favor of a one-step merger).

If approved, the amendments to Section 251(h) would be effective with respect to agreements entered into on or after August 1, 2014.

DGCL Sections 141(f) and 228(c) - Board and Stockholder Actions by Written Consent

The proposed amendment to DGCL Section 141(f) responds to recent Delaware case law that held invalid written consents executed by individuals who are not yet directors at the time of execution. The proposed amendment to Section 141(f) would permit any person, whether or not then a director, to deliver a written consent to a future action by the board of directors occurring no later than 60 days after the written consent is delivered. The written consent will be deemed to have been given at the effective time of the future action so long as the person who delivered the consent is a director at the effective time and did not revoke his or her written consent.

Similarly, the proposed amendment to DGCL Section 228(c) would permit any person to deliver a written consent to a future action by stockholders occurring no later than 60 days after the written consent is delivered. The written consent will be deemed to have been given at the effective time of the future action so long as the person who delivered the consent is a stockholder at the effective time and did not revoke his or her written consent.

The foregoing amendments would seemingly endorse and expressly permit the standard practice in acquisition transactions of having persons who are to become directors or stockholders of a corporation upon consummation of an acquisition execute and deliver in escrow written consents and other documents authorizing transactions that will take place shortly after the acquisition, such as acquisition financing transactions.

DGCL Section 242 - Amendments to a Certificate of Incorporation

The proposed amendments to DGCL Section 242 would authorize a corporation’s board of directors to change its name and delete historical references to its incorporator, its initial directors, its initial subscribers or provisions regarding historical stock reclassifications and stock splits without the approval of the corporation’s stockholders. In addition, the proposed amendments would eliminate the requirement that the notice of a meeting at which an amendment to a corporation’s certificate of incorporation is to be voted on contain a copy or summary of the amendment when the notice constitutes a notice of internet availability of proxy materials under the Securities Exchange Act of 1934.

Section 8106 of the Courts and Judicial Procedure Law - Extended Statute of Limitations for Breach of Contract Claims

In addition to the proposed amendments to the DGCL, an amendment to Section 8106 of the Courts and Judicial Procedure Law was proposed to the Delaware State Bar Association that would permit parties to a written contract involving at least $100,000 to extend the statute of limitations for a breach of contract claim to up to 20 years from the accrual of the claim. The contracting parties would be required to expressly agree in the contract to extend the statute of limitations beyond Delaware’s default three-year statute of limitations for general breach of contract claims.

SEC Division of Corporation Finance Issues New C&DIs Relating to Social Media Use

On April 21, the Securities and Exchange Commission’s Division of Corporation Finance issued new Compliance and Disclosure Interpretations (C&DIs) regarding the use of social media in the context of securities offerings, business combination transactions and other similar transactions, providing guidance to issuers seeking to use social media in compliance with certain SEC rules, including rules requiring the inclusion of legends in various public communications.

In a series of C&DIs, the staff identified circumstances where hyperlinks could be used to satisfy requirements that communications made in reliance upon certain SEC rules be accompanied by lengthy cautionary legends. C&DIs

110.01, 164.02 and 232.15 clarify that the staff will not object to the use of hyperlinks to satisfy the requirement that legends accompany electronic communications made in reliance upon specified sections of the Securities Act of 1933 (Securities Act) and the Exchange Act of 1934 in various contexts, including in connection with securities offerings, business combination transactions, proxy solicitations and tender offers, where: (1) the electronic communication is distributed through a platform, such as Twitter, that has technological limitations on the number of characters or amount of text that may be included in the communication; (2) including the required legend in its entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and (3) the communication contains an active hyperlink to the required legend and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

In addition, C&DIs 110.02 and 232.16 provide guidance regarding an issuer's responsibility to ensure compliance with applicable SEC rules (in particular, Securities Act Rules 134 or Rule 433) by third parties who retransmit (by "re-Tweeting" in the case of Twitter, for example) communications made by the issuer in reliance upon those rules on an electronic or social media platform that allows such re-transmission. The Division of Corporation Finance clarified that if a third party is neither an offering participant nor acting on behalf of the issuer or an offering participant, and the issuer has no involvement in that third party's retransmission beyond having initially prepared and distributed the communication in compliance with applicable SEC rules, the retransmission would not be attributable to the issuer.

BROKER DEALER

FINRA Proposes Rule Establishing Fee Schedule for Access to ATS Volume Data

The Financial Industry Regulatory Authority, Inc. is filing with the Securities and Exchange Commission a proposed rule change to adopt FINRA Rule 4553 (Fees for ATS Data), that would establish a fee schedule for optional professional and vendor access to alternative trading system (ATS) volume information (as required to be submitted by ATSs in a weekly report to FINRA under FINRA Rule 4552) published by FINRA on its website. Non-professionals (i.e., natural persons who use the information for their own personal, non-commercial use) will continue to be able to access the ATS volume information free of charge.

More information on the proposed rule can be found here.

DERIVATIVES

SEC Proposes Recordkeeping and Reporting Rules for Security-based Swaps

On April 17, the Securities and Exchange Commission proposed several new rules relating to security-based swaps. The rules deal with "recordkeeping, reporting, and notification requirements applicable to security-based swap dealers ('SBSDs') and major security-based swap participants ('MSBSPs'), securities count requirements applicable to certain SBSDs, and additional recordkeeping requirements applicable to broker-dealers to account for their security-based swap and swap activities."

Specifically, the SEC is proposing to amend Rules 17a-3, 17a-4, 17a-5 and 17a-11 to establish a recordkeeping, reporting and notification program for broker-dealer SBSDs and broker-dealer MSBSPs. The proposed amendments to Rules 17a-3 and 17a-4 also establish additional recordkeeping requirements applicable to broker-dealers that are not dually registered as SBSDs or MSBSPs to the extent they engage in security-based swaps or swap activities.

The SEC is also proposing new Rules 18a-5 through 18a-9. These new rules would establish a recordkeeping, reporting and notification program for stand-alone SBSDs, stand-alone MSBSPs, bank SBSDs and bank MSBSPs, and securities count requirements for stand-alone SBSDs. (Note: it will be impossible for a bank to be an SBSD once the swap push-out rule takes effect this summer.) In addition, pursuant to Sections 15F and 17(a) of the Exchange Act, the SEC is proposing a new FOCUS Report Form SBS (Form SBS) that is to be used by all types of SBSDs and MSBSPs to report financial and operational information and, in the case of broker-dealer SBSDs and broker-dealer MSBSPs, replace their use of Part II, Part IIA, Part IIB or Part II CSE of the Financial and Operational Combined Uniform Single Report (FOCUS Report).

The new rules also include a proposed capital charge provision for stand-alone SBSDs that "was inadvertently omitted from the proposed Rule 18a-1" when it was originally proposed in 2012.

This 510-page proposal contains numerous specific requests for comments and information. Comments are due 60 days after publication of the proposal in the *Federal Register*, which has not yet occurred. Over 130 pages of the proposal are dedicated to economic analysis of the costs and benefits of the proposed rules and another 60+ pages are used for a new Form SBS. Many of the new informational and recordkeeping requirements are summarized in chart form on pages 217–219 and 222–223.

The SEC estimates that there will be a total of 50 SBSDs and five MSBSPs.

The text of the rules can be found here.

CFTC

CFTC Issues No-action Letter Regarding the Resubmission of Rejected Trades

On April 18, the Division of Clearing and Risk and Division of Market Oversight of the Commodity Futures Trading Commission issued a no-action letter indicating that it will not recommend an enforcement action against a designated contract market (DCM) that allows a market participant to correct a clerical or operational error or omission and resubmit as a new trade a swap transaction that was rejected by a derivatives clearing organization (DCO). In order to rely upon this relief, the following conditions must be met: (i) the original trade must have been rejected due to a clerical or operational error or omission; (ii) the DCM must have rules stating that any trade executed on or pursuant to its rules that is not accepted for clearing shall be *void ab initio*; (iii) the clearing member(s) involved must agree to submit the new trade; (iv) the clearing member(s) must obtain the consent of its customers to submit the trade; (v) neither the DCM nor a clearing member may require a customer to consent to the submission of a new trade in advance; (vi) the new trade must be submitted as quickly as technologically practicable and, in any event, no later than 30 minutes after it is rejected by a DCO; (vii) both the original trade and the replacement trade must be subject to pre-execution credit checks and processed in accordance with the timeframes set forth in CFTC Regulations 1.74, 23.610 and 39.12(b)(7); (viii) the DCM must report the swap transaction data to a swap data repository; and (ix) the procedures established by the DCM do not impair impartial access. The no-action relief expires on June 30, 2014.

The no-action letter is available here.

CME Launches Exchange Action Database

On April 23, CME Group Inc. issued a special executive report informing market participants that it has launched a searchable database of disciplinary actions, summary access denial actions and emergency actions taken by the Chicago Mercantile Exchange, Chicago Board of Trade, New York Mercantile Exchange and Commodity Exchange, Inc. Market participants will be able to search the database for exchange actions dating back to 2010 by date range, category or keyword. The special executive report also indicated that the exchanges will continue to disseminate summaries of exchange actions via email.

The searchable database is available here.

The special executive report is available here.

LITIGATION

Eleventh Circuit Holds that Dodd-Frank Amendments to the Commodity Exchange Act Expand Enforcement Authority of CFTC

The US Court of Appeals for the Eleventh Circuit recently decided in a case of first impression that Amendments to the Commodity Exchange Act made by the Dodd-Frank Wall Street Reform and Consumer Protection Act expand the enforcement authority of the Commodity Futures Trading Commission to a broader class of retail customer transactions made on a leveraged, margined or otherwise-financed basis.

The CFTC brought a civil enforcement action against 20 defendants, including the Chief Executive Officer and Chief Operating Officer of Hunter Wise, a brokerage firm (Appellants), alleging that they violated the Commodity Exchange Act by conducting off-exchange and fraudulent retail commodity transactions. The CFTC alleged that, contrary to Hunter Wise's representations, the broker did not actually trade, store or transfer any precious metals, but instead was managing its risk exposure from customers' trading positions by trading derivatives in its own margin trading accounts with off-exchange precious metal trading companies and never taking possession of any metals. The CFTC alleged that Hunter Wise financed the retail customer trades at issue through credit it extended to dealers it engaged. The dealers, in turn, extended credit to the retail customers. The credit terms of these transactions matured in four years. The CFTC moved for a preliminary injunction, which the US District Court for the Southern District of Florida granted.

The court found that the CFTC has enforcement authority over the retail transactions at issue because the Dodd-Frank amendments expanded the scope of the CFTC's authority over retail commodity transactions offered "on a *leveraged* or *margined* basis, or *financed* . . . *on a similar basis*" (emphasis added). Appellants argued that the italicized terms, which were not expressly defined in the amendments to the statute, should be construed consistent with other provisions in the Commodity Exchange Act and accompanying regulations that limited a "leverage contract" to an agreement having a term of, at minimum,10 years. The court rejected this reading of the amendments and found that absent a specific provision in the statute to the contrary, the terms were to be construed in accordance with their plain and ordinary meanings. As there was evidence that Hunter Wise provided financing for the retail trades, and that the retail customers were subject to margin calls on their trading accounts, the statutory requirements were satisfied. Consequently, the court affirmed entry of the preliminary injunction.

U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC, et al., No. 13-10993 (11th Cir. Apr. 15, 2014).

Delaware Court Holds Clickwrap Agreements Enforceable

In a novel question regarding e-commerce, the Delaware Court of Chancery recently held that clickwrap agreements are valid and enforceable contracts. As defined by the court, a clickwrap agreement is "an online agreement that requires a webpage user to manifest assent to the terms of a contract by clicking an 'accept' button in order to proceed." In this particular case, the clickwrap agreement concerned receipt of employee benefits that were conditioned on compliance with various post-employment restrictions.

The case was brought by Newell Rubbermaid, whose subsidiary manufactures and sells infant and juvenile products. Newell sought a temporary restraining order (TRO) seeking to enjoin a former employee (Defendant) from violating post-employment non-solicitation and confidentiality conditions of restricted stock unit awards (RSUs) that Defendant was awarded over the course of several years. Defendant accepted the RSUs through a third-party website that required her to review and accept the terms of the RSU grant program by clicking the "accept" button. The 2013 grant award program added confidentiality and non-solicitation provisions, which Defendant claimed were not sufficiently conspicuous on the website. Defendant resigned from Newell in early 2014, taking a new position at a direct competitor in the infant and juvenile products market. Newell alleged that Defendant solicited two Newell employees to leave the company. Consequently, Newell sought a TRO, arguing that it had enforceable non-solicitation and confidentiality agreements with Defendant.

The court granted Newell the TRO, finding that Defendant was bound by the agreement formed when she clicked the "accept" box next to the phrase "I have read and agree to the terms of the Grant agreement." The court found that Defendant's affirmative action evidenced her assent to the agreement with actual notice of the terms. The terms of the award, including the restrictive covenants, were accessible via a link next to the "accept" box. The court observed that "Newell's method of seeking [Defendant's] agreement to post-employment restrictive covenants, although certainly not the model of transparency and openness with its employees, was not an improper form of contract formation." Despite acknowledging the "harsh" result for the Defendant, who claimed not to know about the restrictive covenants, the court explained that the Defendant found "herself in this position because of her willingness to accept an agreement without reviewing its terms when there should have been no doubt that she was assenting to a valid, enforceable contract."

Newell Rubbermaid Inc. v. Storm, No. 9398-VCN (Del. Ch. Mar. 27, 2014).

For more information, contact:

SEC/CORPORATE

Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Martin Q. Ruhaak	+1.312.902.5676	martin.ruhaak@kattenlaw.com
Jonathan D. Weiner	+1.212.940.6349	jonathan.weiner@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	+1.212.940.6304	kathleen.moriarty@kattenlaw.com
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	+1.312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	+1.212.940.6447	peter.shea@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Gregory E. Xethalis	+1.212.940.8587	gregory.xethalis@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com

LITIGATION

Emily Stern	+1.212.940.8515	emily.stern@kattenlaw.com
Ashley H. Jones	+1.212.940.6791	ashley.jones@kattenlaw.com

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Katten Muchin Rosenman LLP www.kattenlaw.com

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London: Katten Muchin Rosenman UK LLP.