Proposed Delaware Amendments Would Limit Appraisal Rights in Two-Step Mergers

Since its adoption in 2013, parties have been using a two-step merger structure facilitated by § 251(h) of Delaware's General Corporation Law (the *DGCL*) as a means of avoiding the requirement of calling a special meeting of stockholders, thereby reducing the time between signing and closing a transaction. A recently proposed amendment to § 262 of the DGCL would eliminate an inconsistency that has persisted in the treatment of dissenters' appraisal rights in long-form mergers and two-step transactions. Will these changes make two-step transactions under § 251(h) even more attractive to dealmakers going forward?

Background

Delaware law does not provide dissenting shareholders with appraisal rights in transactions that are effected pursuant to a "long-form" merger (in which the target company calls a special meeting for purposes of obtaining shareholder approval), so long as the consideration paid to the target's shareholders consists solely of stock that is listed on a national securities exchange or is held by more than 2,000 holders. This is the "market out" exception.

However, as currently written, Delaware law does not extend the "market out" exception to two-step mergers effected pursuant to § 251(h), in which the target company is acquired without the need for a stockholder vote following a tender offer.

A proposed amendment to the DGCL on March 20, 2018 is designed to eliminate this inconsistency. Under the proposed amendments, the same "market out" exception that applies to long-form mergers would apply to short form mergers effected pursuant to § 251(h) – i.e., in stock-for-stock deals.

Our View

We have noted that it is exceedingly uncommon for stock-for-stock transactions to be effected as a two-step tender offer/merger under § 251(h). One of the possible reasons for this (in addition to the desire to invoke *Corwin*) is the insulation from appraisal claims that a long form merger offers (and that a two-step transaction does not). By eliminating this discrepancy, the proposed amendments to the DGCL potentially increase the utility of the § 251(h) two-step merger structure. That said, in a stock-for-stock transaction, the acquiror will be required to register its shares on Form S-4 (or Form F-4), and often will not commence the exchange offer until after its registration statement has cleared SEC comments. This SEC review process could potentially erode the timing advantage that a two-step transaction structure could otherwise have offered the parties, unless the buyer elects to do an "early commencement" of the offer. It will be interesting to see whether the proposed amendments result in more widespread adoption by dealmakers of § 251(h) transaction structures.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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