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Proposed Amendments to the Delaware General Corporation Law

On April 17, 2014, the Corporation Law Section of the Delaware State Bar Association proposed legislation that, if adopted, would amend the Delaware General Corporation Law (the DGCL) in a number of important ways. Proposed amendments include:

- **Section 251(h).** (1) Eliminating the prohibition on the use of Section 251(h) when a party to the merger agreement is an "interested stockholder" (as defined in Section 203 of the DGCL), (2) clarifying when a corporation consummating a tender or exchange offer is entitled to effect a short-form merger pursuant to Section 251(h), and (3) clarifying that shares of stock tendered into a tender or exchange offer are not counted for purposes of Section 251(h) unless irrevocably accepted for exchange and received by the depository prior to expiration of such offer;
- **Sections 141(f) and 228(c).** Clarifying that a person may consent to corporate action with a future effective time prior to becoming a director or stockholder and place such consent in escrow (or similar arrangement), provided that such person becomes a director or stockholder prior to the consent becoming effective; and
- **Section 242.** Permitting certain amendments to a corporation's certificate of incorporation without stockholder approval.

If adopted by the legislature, the amendments would become effective August 1, 2014, except those relating to Section 251(h), which would only apply to merger agreements entered into on or after August 1, 2014.

Short-Form Mergers Under Section 251(h)

In 2013, the Delaware legislature adopted Section 251(h) of the DGCL to permit merger agreements to contain a provision eliminating the need for a stockholder vote for a second-step merger following consummation of a tender or exchange offer if certain conditions are met. In the year since its adoption, questions have arisen as to its interpretation, and the proposed amendments to Section 251(h) address certain of those questions, as described below.

Section 251(h)(4) currently prohibits any party who is an "interested stockholder" (as defined in Section 203(c) of the DGCL) of the target at the time the target's board of directors approves the merger agreement from utilizing Section 251(h). Because the definition of "interested stockholder" in Section 203(c) includes any person who "has the right to acquire" 15 percent or more of the target's voting stock, an acquiror may be prohibited from entering into tender and support agreements with stockholders in respect of more than 15 percent of the corporation's voting stock, and such stockholders could be precluded from agreeing to rollover their shares in connection with the transaction. The proposed amendments would eliminate the prohibition on interested stockholders from utilizing Section 251(h), and thereby remove any uncertainty regarding the permissibility of tender and support agreements and rollover agreements in a Section 251(h) transaction.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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The proposed amendments also would clarify when an acquiror is deemed, for purposes of Section 251(h), to "own" the shares of stock acquired in the tender or exchange offer, thereby permitting it to consummate the merger in accordance with Section 251(h). Specifically, shares that would be counted in determining whether the acquiror has sufficient shares to effect a merger under Section 251(h) would include both (1) the shares irrevocably accepted for purchase or exchange pursuant to the offer and "received" by the depository prior to the expiration of the offer, and (2) all shares otherwise owned by the acquiring corporation. Shares are "received" by the depository when stock certificates have been physically received or, for uncertificated shares, when such shares are transferred into the depository's account, or an agent's message has been received by the depository. Accordingly, shares tendered by guaranteed delivery would not be counted unless and until they are actually received by the depository.

Additionally, the proposed amendments would clarify that the offer, which must be for "any and all of the outstanding stock" of the target, may exclude stock of the target that is owned at the commencement of the offer by (1) the target, (2) the corporation making the offer, (3) any person that owns, directly or indirectly, all of the outstanding stock of the corporation making the offer, and (4) any direct or indirect wholly owned subsidiary of any of the foregoing. They also would clarify that shares owned by such persons need not be tendered into the offer or converted into the same consideration as shares accepted in the offer.

Finally, the proposed amendments to Section 251(h) would make clear that the merger agreement may "permit" or "require" the merger to be effected under Section 251(h), and the requirement that the merger be effected as soon as practicable following the consummation of the offer would apply only if such merger is actually effected under Section 251(h).

The proposed amendments to Section 251(h) do not change the fiduciary duties of directors in connection with mergers effected pursuant to Section 251(h) or the level of judicial scrutiny that will apply to the decision to enter into such a merger agreement, each of which will be determined based on the common law of fiduciary duty, including the duty of loyalty.

Actions by Written Consent With Future Effective Times

The proposed amendments to Sections 141(f) and 228(c) are intended to clarify that a person may consent to corporate action with a future effective time, provided that such person becomes a director or stockholder prior to the consent becoming effective.

Section 141(f): Action by the Board of Directors

In order to provide certainty with respect to actions that need to be signed in advance of an acquisition closing and similar situations, when a person is not yet a director, but expected to become one at the closing, the proposed amendment to Section 141(f) would permit such person to execute a consent with a future effective time, subject to certain requirements. The proposed amendment to Section 141(f) would clarify that a person (whether or not then a director) may execute a consent, and that such consent may be placed in escrow (or similar arrangement), to become effective at a later time (including a time determined upon the happening of an event), so long as (1) the escrow period does not exceed 60 days, (2) the person is a director at the time the consent becomes effective and (3) the consent is not revoked prior to the consent becoming effective. Any consent executed in accordance with the foregoing would be revocable prior to it becoming effective.

Section 228(c): Action by Stockholders

Similarly, the proposed amendment to Section 228(c) would clarify that a person may execute a consent, and that such consent may be placed in escrow (or similar arrangement) for up to 60 days, to become effective at a later time (including a time determined upon the happening of an event) and that the later effective time would then be treated as the date the consent was signed. Any such consent would be revocable prior to its becoming effective. The proposed amendment to Section 228(c) does not affect the requirement that the consent bear the actual date of signature and, unlike the proposed amendment to Section 141(f), does not expressly state that the person signing such consent need not be a stockholder when the consent is signed, since current law provides that a person executing a written consent need not be a stockholder at the time of execution, but only on the applicable record date.

Amendments to Certificates of Incorporation Without Stockholder Approval

The proposed amendments to Section 242 would authorize a corporation to amend its certificate of incorporation without stockholder approval (unless otherwise expressly required by the certificate of incorporation) to (1) change the corporate name or (2) delete provisions of the original certificate of incorporation that named the incorporator, the initial board of directors and the original subscribers for shares and (3) delete provisions contained in any amendment to the certificate of incorporation as were necessary to effect a previously effected change, exchange, reclassification, subdivision, combination or cancellation of stock. If adopted, amended Section 242 also would eliminate the requirement that the notice of a meeting at which an amendment is to be voted on contain a copy of the amendment itself or a brief summary thereof, but only when the notice constitutes a notice of internet availability of proxy materials under the Securities Exchange Act of 1934.