

Proposed Delaware General Corporation Law Amendments Would Address Appraisal Proceedings, Short-Form Mergers, Court of Chancery Jurisdiction

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On March 16, 2016, the Corporation Law Council of the Delaware State Bar Association announced proposed amendments to the Delaware General Corporation Law (DGCL) intended to address appraisal proceedings, Section 251(h) short-form mergers and Court of Chancery jurisdiction, among other provisions.

Appraisal Proceedings

Regarding appraisal proceedings, the proposed amendments are substantially the same as those proposed by the Corporation Law Council in 2015. The proposed changes, if adopted, would limit the right to bring an appraisal proceeding with respect to publicly traded companies if the claim is *de minimis*. Accordingly, the proposed amendments authorize dismissal of appraisal proceedings unless: (i) the total number of shares entitled to appraisal exceeds 1 percent of the outstanding shares that could have sought appraisal, (ii) the value of the merger consideration for the total number of shares entitled to appraisal exceeds \$1 million, or (iii) the merger is a parent/subsidiary merger approved under Sections 253 or 267 of the DGCL. The proposed amendments also address the ongoing concern over “appraisal arbitrage,” or the acquisition of shares with attendant appraisal rights purchased after a merger announcement in anticipation of a favorable appraisal award, including interest. The proposed amendments permit a corporation to cut off the accrual of interest by paying stockholders pursuing an appraisal claim an amount chosen by the corporation. Interest would only accrue on any excess of the appraisal award over the amount so paid and on any interest theretofore accrued, unless paid by the corporation at the time it makes the estimated payment.

Section 251(h) Short-Form Mergers

The proposed amendments also would modify Section 251(h), which provides a mechanism to consummate a short-form merger without the need for stockholder approval if certain requirements are met following first-step tender, exchange or other offers for all outstanding shares of stock entitled to vote on the merger. The proposed amendments, if adopted, would clarify that a tender, exchange or other offer may be conditioned on the tender of a minimum number or percentage of the target’s shares, or of any class or series thereof. The proposed amendments also provide that Section 251(h) is applicable to corporations that have a class or series of stock listed on a national securities exchange or held of record by more than 2,000 holders, even if not all classes or series of stock of such corporations are so listed or held. The proposed amendments also clarify that, if the target corporation has more than one class or series of stock entitled to vote on the merger, there may be separate offers consummated for different classes or series. The proposed amendments would permit, for calculating whether the offeror has sufficient shares to approve the merger, inclusion of rollover stock (defined below) and shares of stock held by direct and indirect parent entities of the corporation making the offer (Offeror), and by direct or indirect wholly owned subsidiaries of such parent entities or of the Offeror (Offeror Affiliates). The proposed amendments also provide that rollover stock and shares that, as of commencement of the offer, are owned by the target corporation, the Offeror and any of their respective direct or indirect wholly owned subsidiaries, may be excluded from conversion in the merger into the right to receive the merger consideration.

Rollover stock is defined in the proposed amendments as shares of stock of the target corporation that are the subject of a written agreement requiring such shares be transferred, contributed or delivered to the Offeror or any Offeror Affiliate in exchange for stock or other equity interests in the Offeror or any Offeror Affiliate. The proposed amendments provide that rollover stock ceases to be defined as such, and therefore is not

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included in the calculation of whether the Offeror has sufficient shares to approve the merger (the Statutory Minimum Test), if, immediately prior to the merger becoming effective, such shares have not been transferred, contributed or delivered to the Offeror or Offeror Affiliates pursuant to such agreement.

Finally, the proposed amendments, if adopted, would clarify the methods by which certificated and uncertificated shares of stock of the target corporation may be “received” for purposes of determining whether they are counted toward the Statutory Minimum Test.

Court of Chancery Jurisdiction

The proposed amendments expand the jurisdiction of the Court of Chancery of the State of Delaware to include any civil action to interpret, apply, enforce or determine the validity of the provisions of any instrument, document or agreement (i) to which a corporation and one or more of its stockholders are parties, pursuant to which one or more stockholders sells or offers to sell any stock of the corporation, and (ii) by which a corporation agrees to sell, lease or exchange any of its property or assets, and which, by its terms, provides that one or more holders of its stock approve of or consent to such sale, lease or exchange.

Other Amendments

The proposed amendments also address quorum and voting requirements for committees and subcommittees of boards of directors, and provide that stock certificates may be executed by any two authorized officers, rather than specifying the officers who may execute stock certificates. In addition, the proposed amendments clarify the procedures for revoking dissolution, restoring a corporation’s certificate of incorporation after it has expired by limitation and reviving a corporation’s certificate of incorporation when it has become forfeited or void.

Effective Time

If approved by the Corporation Law Section and Executive Committee of the Delaware State Bar Association, the proposed amendments will be introduced in the General Assembly for consideration and, if adopted, would become effective August 1, 2016. The proposed amendments to Section 262 addressing appraisal proceedings and to Section 251(h), however, would be effective only for merger and other transaction agreements entered into (or, for short-form mergers, board resolutions adopted) after August 1, 2016. Copies of the proposed legislation are attached for your review.