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Clarifying Amendments to DGCL Section 251(h) Take Effect

August 4, 2014

The amendments proposed by the Delaware legislature to eliminate certain ambiguities in Section 251(h) of the Delaware General Corporation Law took effect on August 1, 2014, and will apply to merger agreements for Delaware corporations entered into on or after that date. As we described in a previous alert, Section 251(h) streamlines the process for acquiring a Delaware corporation by means of a two-step transaction (a first-step tender offer followed by a second-step merger).

To recap, the highlights of the clarifying amendments to Section 251(h) include the following:

- “Interested Stockholder” Prohibition Removed. Entering into tender and support agreements covering 15% or more of the target’s stock will no longer jeopardize reliance on Section 251(h).
- Ability to “Include” Shares Otherwise Owned or Irrevocably Accepted. “Roll over” shares, sometimes used in private equity sponsor transactions, will now count toward the stockholder approval threshold necessary for the Section 251(h) second-step merger.
- No Requirement to Convert Shares Held at Commencement into Offer Consideration. Shares held by the parties to the merger agreement and related persons at offer commencement may be treated differently.
- Non-Compulsory Use of Section 251(h). Merger agreements may “permit” the merger to be consummated under Section 251(h), without foreclosing the possibility of the merger being consummated under other provisions of Section 251 or under Section 253.

Section 251(h) has seen a significant amount of use in Delaware deals since its adoption on August 1, 2013. The clarifying amendments described above are very likely to continue this trend and increase the use of Section 251(h) in Delaware deals.

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