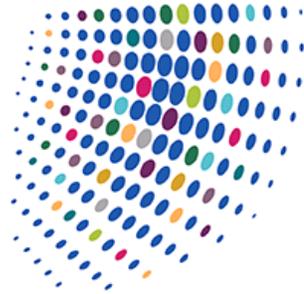


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Delaware's Latest M&A Export to Other States: Streamlined Tender Offers and Section 251(h)

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Delaware has been the leading jurisdiction for corporate law (particularly in relation to M&A) in the United States for decades, and it is not uncommon for legislatures and courts in other states to look to Delaware for guidance on various M&A legal issues. Delaware has also been an innovator in corporate law, including as recently as 2013 when it adopted Section 251(h) to the Delaware General Corporation Law (DGCL).

Section 251(h) of the DGCL streamlined two-step acquisitions (comprised of a first-step tender or exchange offer, followed by a second-step merger) by dispensing with, in the second-step merger, the need to hold a stockholder meeting or utilize a short-form merger (if available, including via a top-up option) to squeeze out target stockholders who did not tender into the first-step tender or exchange offer. In effect, Section 251(h) removed the risk that the second-step transaction could not close immediately following the closing of the first-step tender or exchange offer.

Section 251(h) has been widely used in M&A transactions since its adoption, and has significantly facilitated structuring and execution of acquisitions via tender or exchange offers. One question that many deal lawyers have had was whether any other states would follow the lead of Delaware and also adopt a statute similar to Section 251(h). There are signs that other states are now beginning to follow suit, beginning with Maryland, Texas, and Virginia.

In 2014, Maryland enacted Section 3-106.1 of the Maryland General Corporation Law (MGCL). Section 3-106.1 of the MGCL is closely modelled on Section 251(h) of the DGCL, and even permits the offeror to be an entity other than a corporation, thereby providing increased structuring flexibility. Section 3-106.1 also specifically applies to a Maryland real estate investment trust (REIT). Similar to the existing MGCL short-form merger provision, Section 3-106.1 contains a requirement to deliver notice of the transaction to target shareholders 30 days before the second-step merger, which notice requirement could presumably be satisfied by mailing the notice at or prior to commencing the tender offer.

In 2015, Texas enacted Section 21.459(c) of the Texas Corporation Law (TCL) sub-sections of the Texas Business Organizations Code. Section 21.459(c) of the TCL also bears a strong resemblance to Section 251(h) of the DGCL. Similar to Section 3-106.1 of the MGCL, Section 21.459(c) does not require that the offeror

be a corporation, and instead permits almost any entity form—including a joint venture, bank, or insurance company—to utilize Section 21.459(c).

Also in 2015, Virginia enacted Section 13.1-718.G of the Virginia Stock Corporation Act (VSCA). Notably, Section 13.1-718.G of the VSCA permits a corporation or limited liability company offeror to consummate the second-step squeeze-out transaction by way of a statutory share exchange or a merger. A second-step share exchange may be of particular use to foreign acquirers in cross-border deals (with Spain being one such jurisdiction), who—due to foreign-law corporate and tax issues—may not be able use a merger to issue acquirer shares in the transaction.

While the adoption by three other states of a Section 251(h)-type provision does not in and of itself constitute a trend, it is a welcome development for deal lawyers and deal participants, dispensing with both the need for a second-step short-form merger and top-up options and the risk of a time delay between the tender offer closing and the merger closing in a two-step transaction. While Maryland, Texas, and Virginia provide some hope to deal lawyers that other jurisdictions may yet follow suit, it remains to be seen whether Section 251(h) will be more broadly adopted in other states in the next several years.

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