

Amendments to Delaware General Corporation Law Should Make Two-Step Acquisitions of Publicly Traded Companies More Attractive

With effect from August 1, 2013, a new provision of the Delaware General Corporation Law (DGCL), Section 251(h), should make all-cash two-step acquisitions of publicly traded corporations more attractive to acquirers for whom prompt completion of the second stage is important. Section 251(h) generally will be available for any negotiated acquisition in which the acquirer is not a 15%-or-greater stockholder when it enters into a merger agreement with the target and all stockholders are to receive the same consideration per share.

When Section 251(h) is available, the acquirer will be assured of being able to quickly complete its second-step merger (eliminating non-tendered shares, and leading to 100% ownership by the acquirer) if following the tender offer the acquirer owns the number of shares required to vote through a merger (a simple majority of shares outstanding, unless the target's certificate of incorporation requires more). Previously, speedy completion of a second-step merger was possible only if the acquirer reached the 90% ownership threshold necessary to qualify for the "short form" merger procedure provided for in the DGCL. The short form merger procedure will continue to be available, including for transactions for which the new Section 251(h) procedure is not available.

Section 251(h)

Under new Section 251(h), a Delaware corporation that has exchange-listed shares or shares held by more than 2,000 record holders can be acquired in a two-step transaction (tender offer followed by merger) without any requirement to obtain stockholder approval if the following requirements are satisfied:

- A merger agreement must be entered into before the first-step tender offer is launched and must expressly provide that the merger will be governed by Section 251(h) and effected as soon as practicable after the tender offer is consummated (because of this requirement, Section 251(h) will not be available in most hostile transactions);
- Following consummation of a tender offer for all outstanding target stock entitled to vote, the acquirer must own at least the required percentage of each class or series of target stock that otherwise would have been required to vote for adoption of the merger agreement (as noted above, this requirement frequently will be satisfied by ownership of a simple majority of the target's outstanding common stock);
- At the time the target board of directors approved the merger agreement, no other party to the agreement can have been an "interested stockholder" (as defined in Section 203 of the DGCL – generally, a 15% stockholder) of the target;
- The acquirer will merge with or into the target pursuant to the merger agreement; and
- In the merger, shares not acquired in the tender offer must be converted into the same amount and kind of consideration paid for shares that were tendered (so for example a transaction involving an equity rollover may not qualify).

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