



Proposed Amendments to Delaware Law Would Facilitate Tender Offer Structures

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The Delaware bar has recently proposed an amendment to the Delaware General Corporation Law that is likely to facilitate the use of tender offer structures, especially in private equity deals. The new proposed Section 251(h), which is expected to be approved by the legislature and governor with an effective date of August 1, would permit inclusion of a provision in a merger agreement eliminating the need for a stockholder meeting to approve a second-step merger following a tender offer, so long as the buyer acquires sufficient shares in the tender offer to approve the merger (i.e., 50% of the outstanding shares, unless the company's charter provides a higher threshold).

Currently, a two-step merger in which the buyer acquires less than 90% of the target's shares in the first step tender offer (which would allow it to close the merger almost immediately by the use of Delaware's short-form merger statute) necessitates stockholder approval of the merger, with its attendant delays and a "fait accompli" stockholder vote. As such possible delays have proved to be a significant deterrent to many tender offers, especially those with private equity buyers who need to close on the first and second steps concurrently in order to facilitate their acquisition financing, the market has evolved a workaround in the form of a "top-up" option. When included in a merger agreement, a top-up option permits the buyer to "top-up" its stake with newly issued shares to reach the required 90% short-form threshold. However, due to the extremely dilutive effect of the top-up issuance, a target company may lack sufficient authorized but unissued shares to ensure that the buyer reaches the needed 90% threshold, thus adding deal uncertainty. To deal with such circumstances, buyers and targets have resorted to other imperfect workarounds, for example a "dual-track" structure in which the parties file a proxy statement while

the tender offer is pending (in order to start the clock on SEC review of the proxy statement), and switch to the merger process if the tender offer fails.

The proposed amendment simplifies this landscape by eliminating the need for top-up options and “dual-track” structures in most cases, and also would diminish the use of subsequent offering periods. Although there may be questions about whether the new mechanism will provide incentives for some deal opponents to not tender, since there would be no comparative “cost” to doing so on account of there being no delay in receiving the merger consideration, the changes are expected to facilitate tender offers. The proposed amendment also illustrates the State of Delaware’s commitment to revise its corporate laws to ensure they remain state-of-the-art as inefficiencies are identified through an evolving deal landscape.