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SEC/CORPORATE

2016 Amendments to Delaware General Corporation Law Highlight Two-Step Mergers and Appraisal Rights

On August 1, a number of amendments to the Delaware General Corporation Law (DGCL) went into effect. Notably, several of the amendments modified sections of the DGCL pertaining to (1) two-step mergers effected under Section 251(h) of the DGCL, and (2) appraisal rights and proceedings.

Section 251(h) Mergers

DGCL Section 251(h) provides a mechanism for a buyer to effectuate the negotiated acquisition of a Delaware-domiciled publicly-traded corporation by a tender offer to purchase at least a majority of outstanding shares of the target, followed by a short-form merger to acquire any shares not tendered in such offer. This back-end merger does not require stockholder approval, thereby saving the buyer the time and expense involved in preparing and filing a proxy statement and holding a stockholders' meeting if Delaware's standard short-form merger threshold (90%) is not satisfied. The 2016 amendments to the DGCL clarified certain Section 251(h) requirements and increased the availability of such short-form mergers to potential buyers. Most notably, the 2016 amendments to the DGCL provide for the following:

- *Clarification of which corporations are eligible to utilize Section 251(h)*. Prior to the 2016 amendments, Section 251(h) provided that the target corporation shares needed to be listed on a national exchange or held of record by more than 2,000 holders immediately prior to the execution of the merger agreement. The 2016 amendments clarify that the Delaware corporation will qualify for Section 251(h) so long as at least one class or series of stock is listed on a national securities exchange.
- *Calculation of statutory minimum tender condition*. Section 251(h) requires the purchaser in the offer to acquire a number of shares in such offer that would be sufficient to adopt the agreement of merger in the absence of Section 251(h). Mechanically, rollover shares were not included in such calculation. The 2016 amendments permit the inclusion of the following shares in calculating whether that requisite threshold has been satisfied: (1) "rollover stock" (i.e., shares of the target's stock subject to written contract requiring such shares to be delivered to the buyer in exchange for equity in the buyer or one of its affiliates, and (2) shares of the target's stock held by any direct or indirect subsidiary of the target or by such buyer (collectively, the "Excluded Stock").
- *Clarification and streamlining of certain minimum conditions*. The 2016 amendments provide that (1) the offer in connection with a Section 251(h) merger must be for "all" of the shares of the target corporation entitled to vote on the merger but may (A) be conditioned on the tender of a minimum amount of such shares and (B) exclude the Excluded Stock, and (2) such offer may be effectuated through one or more separate offers for separate classes or series of stock.
- *Simplifying exceptions to the equal treatment exception.* Section 251(h) contains a requirement that all outstanding target shares be treated equally in that they must all be converted in the back-end merger into the same consideration paid for such shares in the offer, with the exception of shares that were held in the target's treasury or by the target's direct or indirect subsidiaries, the ultimate parent buyer of the surviving corporation or any of their respective direct or indirect subsidiaries. Before the 2016 amendments, such shares additionally needed to be excluded from the front-end offer in order to be excluded from the "equal

treatment" requirement. Now, such shares—as well as rollover shares—may be excluded, even if they were not excluded from the front-end offer.

The 2016 amendments also provided for several additional technical changes, clarifying the definition of shares "received" for purposes of determining whether the minimum number of shares have been "received" to meet the offer condition.

Appraisal Rights and Proceedings

Section 262 of the DGCL, which provides for appraisal rights, was amended most notably to:

- Create a *de minimis* exception to dismiss an appraisal proceeding with respect to shares listed on a national securities exchange prior to the merger unless (1) the total number of shares seeking appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such shares seeking appraisal exceeds $1 million or (3) the merger was effected pursuant to DGCL Section 253, which provides for a short-form merger of a parent corporation and its substantially (at least 90%) or wholly owned subsidiary, or DGCL Section 267, which provides for the merger of a non-corporate parent entity and its substantially (at least 90%) or wholly owned subsidiary; and
- Permit the tolling of the accrual of statutory interest prior to the entry of judgment in an appraisal proceeding by cash payment made by the corporation. If the surviving corporation makes such early payment, interest accrues only upon (1) any amount by which the fair value of the shares as determined by the Delaware court exceeds the amount paid by such surviving corporation, and (2) previously accrued interest, unless also paid early.

Other DGCL Amendments

Other recent amendments to the DGCL include: (1) the addition of procedures to revive a corporation whose existence has expired pursuant to a limitation in its charter, (2) the addition of default quorum and voting requirements for board committees and subcommittees of a board of directors, and (3) the simplification of requirements regarding which officers are required to sign a corporation's stock certificates.

BROKER-DEALER

FINRA Files Proposed Amendment to FINRA Rule 2232

On August 15, the Securities and Exchange Commission published the Financial Industry Regulatory Authority's proposed amendment to FINRA Rule 2232, which will require FINRA members to provide additional price disclosures to retail customers in relation to certain transactions in fixed income securities. FINRA believes the proposed amendment will allow customers to better evaluate the cost and quality of execution services provided by FINRA members, promote transparency into firms' pricing practices, and encourage communications between firms and their customers with respect to pricing in fixed income transactions.

Specifically, the proposed amendment would require a FINRA member to disclose its mark-up or mark-down from the prevailing market price of a security where the FINRA member (1) engages in a transaction in corporate debt or agency debt securities as a principal opposite a retail customer and (2) executes one or more offsetting principal transactions on the same day in the same security that, in the aggregate, meet or exceed the size of the customer transaction.

Where a FINRA member engages in an offsetting transaction with an affiliate, the proposed amendment would require the member to "look through" its transaction with the affiliate to the affiliate's transaction with a third party if the offsetting principal transaction is not conducted on an arm's length basis. A transaction is conducted on an arm's length basis if there is a competitive process in which non-affiliate firms are also able to participate and the affiliate relationship does not influence the price paid or proceeds received by the FINRA member.

The proposed amendment contains two exceptions from the disclosure requirement: the first exception pertains to same day, offsetting principal trades conducted by a trading desk functionally separate from the desk that executed the transaction with the retail customer, and the second exception pertains to certain fixed-price offerings.

Comments concerning the proposed amendment must be submitted within 21 days of its publication in the *Federal Register*. The SEC's publication is available here.

DERIVATIVES

See "CFTC Releases Swap Dealer De Minimis Exception Report" and "CFTC Issues Final Response To Remand Order in SIFMA v. CFTC" in the CFTC section.

CFTC

CFTC Releases Swap Dealer *De Minimis* Exception Report

On August 15, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (Division) published the *Swap Dealer De Minimis Exception Final Staff Report*, which summarizes industry comments and data related to the scheduled change to the *de minimis* exception under the CFTC rules defining "swap dealer." A related preliminary report analyzed swap data and policy considerations to assess the current *de minimis* threshold and potential alternatives. (For a more complete discussion of the preliminary report, see the November 20, 2015 edition of the ***Corporate & Financial Weekly Digest***.) The current threshold of $8 billion will decrease to $3 billion after December 31, 2017, unless the CFTC sets a different date or modifies the *de minimis* exception.

The Division made no recommendations regarding the *de minimis* exception but presented several alternatives for the CFTC's consideration: (1) setting a higher or lower notional *de minimis* threshold; (2) excluding from an entity's *de minimis* calculation swaps that are traded on a registered or exempted swap execution facility or on a designated contract market and/or cleared; (3) adopting a multi-factor approach that would potentially include counterparty count and/or transaction count metrics in the *de minimis* exception, in addition to a gross notional dealing threshold; and (4) setting a notional *de minimis* threshold specific to each asset class.

The final report is available here.

CFTC Issues Final Response To Remand Order in *SIFMA v. CFTC*

On August 16, the Commodity Futures Trading Commission published in the *Federal Register* its final response to the order of the US District Court for the District of Columbia in *SIFMA v. CFTC*, which remanded eight swaps-related rulemakings for new cost-benefit analysis.

As reported in the ***Corporate & Financial Weekly Digest*** edition of March 13, 2015, the 2014 case involved a challenge to the CFTC's extra-territorial application of several swaps rules and cross-border guidance. The court remanded the rules, requiring the CFTC to consider the costs and benefits of the application of the swaps rules outside of the United States. The initial CFTC response, issued on March 10, 2015, explained that the swaps market functions internationally, and the costs and benefits identified in the rules apply to both domestic and foreign swap activities subject to CFTC jurisdiction. The initial response also requested comments on the costs and benefits of the extraterritorial and domestic application of the rules.

The final response summarizes industry comments, including some commentary distinguishing extraterritorial and domestic application of the remanded rules. However, the final response ultimately concludes that no changes to the substantive requirements of the rules are required.

The final response is available here.

CPMI and IOSCO Publish Report on CCP Resiliency Planning

The Committee on Payments and Market Infrastructures (CPMI) and the Board of the International Organization of Securities Commissions (IOSCO) published a report entitled *Resilience and recovery of central counterparties*

(CCPs): Further guidance on the PFMI (Report), which seeks to clarify how CCPs should implement the CPMI-IOSCO *Principles for Financial Market Infrastructures (PFMI)*. The PFMI strengthen the international standards for risk management for financial market infrastructures (FMI) and are designed to make FMI more resilient in financial crises.

The Report emphasized how CCPs have become components of the financial system as more jurisdictions introduce mandatory central clearing for standardized over-the-counter derivatives. To improve the resilience of CCPs, the Report outlined five key components of a CCP's financial risk management: (1) governance; (2) stress testing for both credit and liquidity exposures; (3) coverage; (4) margin; and (5) a CCP's contribution of its financial resources to losses. The Report is not intended to impose additional requirements on CCPs, rather, the guidance it provides is intended to be read in conjunction with the requirements set forth in the PFMI.

A copy of the Report is available here.

NFA Updates Self-Examination Questionnaire

On August 15, National Futures Association issued a series of updates to its Self-Examination Questionnaire, which all NFA members must complete annually. The revised questionnaire adds a section to the Supplemental Questionnaire for introducing brokers on Forex Electronic Trading Systems and provides additional technical clarifications under the financial section of the Supplemental Questionnaire for commodity pool operators.

The updated questionnaire is available here.

UK DEVELOPMENTS

FCA Announces Final Phase of Work on New Website

On August 11, the UK Financial Conduct Authority (FCA) announced it was commencing the final phase of work on its new website. After years of criticism for not being user-friendly, the FCA re-launched its website in June 2016 with improvements aiming to make the website "task-driven" and accessible across multiple devices (PCs, tablets and mobiles). The FCA also created a dedicated section for financial markets to highlight the latest developments in markets policy, news and resources. The FCA has announced that this final phase of work is to redesign the News and Publications sections of the website to enhance search and filter tools and to include timeline information for new publications (e.g., to show that a particular document is open for consultation, closed or subject to a final policy statement). The FCA expects the website to be completed in September 2016 and accessible, once again, from www.fca.org.uk.

A copy of the FCA's press release is available here.

EU DEVELOPMENTS

City of London Law Society and Joint Working Parties Publish Second EU Market Abuse Regulation Q&A

On August 17, the City of London Law Society and Law Society Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code (Joint Working Parties) published a Questions and Answers paper (Q&A) on the EU Market Abuse Regulation (MAR). The Q&A published sets out the Joint Working Parties' suggested approach to implementing particular matters of MAR and follows an initial Q&A document published by the Joint Working Parties on July 5, 2016 (July Q&A).

MAR went into effect on July 3 and introduces new requirements previously not covered in the Market Abuse Directive in relation to market soundings and persons discharging managerial responsibilities (PDMR) within an issuer, among others. Under MAR, disclosing inside information in the course of a market sounding is deemed to be part of the normal exercise of a person's employment, profession or duties, so long as they comply with the MAR provisions on market soundings. MAR also introduces notification and closed-period requirements for PDMR's within an issuer when dealing on their own account in relation to the issuer.

The latest Q&A covers the scope of the market soundings regime (including when negotiations and communications between bidders and targets, and/or bidders and shareholders, in relation to irrevocable undertakings to accept the offer/vote in the scheme fall within the market sounding regime), stake-building on a takeover, and PDMR dealings (including in relation to what dealings a PDMR can accept or enter into during or outside a closed period), among others.

A copy of the Q&A is available here, and the July Q&A is available here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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