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Current Trends in Tender Offers: Exploring the Issues and Impact of New DGCL Section 251(h)

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The main content area is titled 'Practical Law for Law Firms'. It features a 'Practice Areas' section with a grid of links: Antitrust, Arbitration: International, Bankruptcy, Capital Markets & Securities, Commercial, Corporate and M&A, Employee Benefits & Executive Compensation, Finance, Intellectual Property & Technology, Labor & Employment, Litigation: Federal, Real Estate, and Tax. To the right of this grid is a 'What Are You Working On?' box with a 'Get Started Now' button.

Below the practice areas, there are three main sections: 'What's Market' (with a 'Get up to speed on the latest deals, agreements and filings.' and a 'All What's Market' link), 'State Q&A' (with a 'Review and compare state law across multiple practice areas.' and a 'All State Q&A' link), and 'Featured Updates' (with an 'All updates' link). The 'Featured Updates' section contains three articles: 'The Letter of Intent for BlackBerry: Desperate Times, Desperate Measures' (dated September 26, 2013), 'What's Market Public Merger Activity for the Week Ending September 27, 2013' (dated September 26, 2013), and 'In re Kenneth Cole: New York Court Dismisses Challenge to Going-private Transaction' (dated September 24, 2013).

At the bottom right, there is a 'Meet the Team' section featuring a profile for 'Lawrence Hsieh, Commercial' and a 'Meet Our Experts' button. Below that is a 'The New Practical Law' section with a 'Learn More' button.

Agenda

- Overview of Section 251(h)
- Drafting Merger Agreement Provisions to Opt Into Section 251(h)
- Special Issues Associated with Section 251(h)
- Q&A

Overview: Section 251(h)

Section 251(h) at a Glance

- On August 1, 2013, a significant amendment to the Delaware General Corporation Law (DGCL) became effective that created a new Section 251(h).
- DGCL Section 251(h) eliminates the stockholder approval requirement for second-step mergers when:
 - an acquiror completes a first-step tender offer, and
 - owns at least the percentage of target company stock that would otherwise be required to adopt the merger agreement under Delaware law (typically a majority of the outstanding shares).

Conditions to Qualify for Section 251(h)

- The merger agreement expressly provides that the merger is governed by Section 251(h) and will be effected as soon as practicable following the closing of the applicable tender or exchange offer.
- No party to the merger agreement is an “interested stockholder” (as defined in DGCL Section 203(c)) of the target company at the time the merger agreement is approved by the target company’s board.
- The acquiror closes the applicable tender or exchange offer for any and all of the outstanding stock of the target company on the terms provided in the merger agreement that, absent Section 251(h), would have been entitled to vote on the merger.
- All outstanding shares of the target company stock that are not cancelled in the merger will be converted into (or into the right to receive) the same amount and kind of cash, property, rights or securities paid for shares of the relevant class or series of stock of the target company on closing of the tender or exchange offer.
- Following the closing of the applicable tender or exchange offer, the acquiror owns at least the percentage of stock that, absent Section 251(h), would be required to adopt the merger agreement under Delaware law and the target company’s certificate of incorporation (typically a majority).
- The target company’s certificate of incorporation does not expressly require a stockholder vote for a back-end merger.
- The target company’s shares are listed on a national securities exchange or held of record by more than 2,000 holders immediately before the merger agreement is executed.
- The corporation closing the tender or exchange offer merges with or into the target company under the merger agreement.
- A certificate of merger is filed.

Advantages of Section 251(h) Structure

- **Speed of execution.** Eliminating the stockholder meeting and approval requirement means that a two-step transaction can close immediately after the tender offer closes, without the acquiror having to:
 - meet the “short-form” merger requirements under DGCL Section 253 (acquire at least 90% of each class of the target company’s shares), or
 - wait several months to close (usually one to three months after the tender offer closes) in a second-step “long-form” merger under DGCL Section 251 and the applicable SEC rules.
- **Reduced expenses.** Expenses will be significantly reduced if the target company does not hold a stockholders’ meeting and it is not required to prepare and distribute a proxy or information statement to its stockholders.

Drafting to Opt-In to Section 251(h)

Language to Opt-In to Section 251(h)

Parties must “opt-in” to Section 251(h) by specifically providing in the merger agreement that the merger is governed by Section 251(h).

SECTION [2.1]: THE MERGER

“On the terms and subject to the conditions set forth in this Agreement, and in accordance with the DGCL, at the Effective Time Merger Sub will merge with and into the Company. As a result of the Merger, the separate corporate existence of Merger Sub will cease and the Company will continue its corporate existence under the DGCL as the surviving corporation in the Merger (sometimes referred to herein as the “Surviving Corporation”). The Merger will be governed by Section 251(h) of the DGCL and shall be effected as soon as practicable following the consummation of the Offer.”

Interested Stockholder Representation

SECTION [5.08]: DGCL SECTION 203

“(a) Prior to the Company Board Meeting, neither Parent nor Merger Sub was an “interested stockholder” as defined in Section 203 of the DGCL.

(b) Prior to the date of this Agreement, neither Parent nor Merger Sub has taken, or authorized or permitted any Representatives of Parent or Merger Sub to take, any action that would cause either Parent or Merger Sub to be deemed an “interested stockholder” as defined in Section 203 of the DGCL or otherwise render Section 251(h) of the DGCL inapplicable to the Merger.”

Eliminating Certain Common Provisions

- Top-up options
- Subsequent offering periods
- Stockholder meeting covenants

What's Market in Section 251(h) deals

- 15 tender offer deals were filed since August 1, 2013.
- Five deals had top-up options (3 were top-ups to be used as a contingency if the parties could not complete a 251(h) merger; the other 2 were not contingent).
- Twelve deals had no stockholder meeting covenant. Three deals had a stockholder meeting covenant, but it was only applicable if stockholder approval was required to complete the merger.
- Only one deal did **not** include a Section 203 interested stockholder representation by the buyer.
- Three deals did not include any language for a subsequent offering period. Five deals permitted a subsequent offering with the target's prior approval. Seven other transactions included provisions for a subsequent offering period at the buyer's option (of which 2 deals included conditional language available only if the top-up was not met or Section 251(h) inapplicable).

Special Issues in a 251(h) Structure

Developing Issues

- Acquirors dependent on acquisition financing
- “Interested Stockholder” limitations
- Equity rollovers
- Appraisal conditions to tender offers (change in DGCL §262)

Questions

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Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

- [Merger Agreement \(Tender Offer, Pro-buyer\)](#)
- [Tender Offer Timeline \(With Section 251\(h\) Merger\)](#)
- [What's Market: Tender Offers](#)

About the Speakers

Richard Hall, Partner, *Cravath, Swaine & Moore LLP*

Richard Hall is a partner in Cravath's Corporate Department. His practice focuses on mergers and acquisitions and corporate governance advice. Mr. Hall is Cravath's Head of the Mergers and Acquisitions practice for EMEA.

Mr. Hall's clients have included Archer-Daniels-Midland Company, Banco Santander, Barrick Gold Corporation, ConocoPhillips, Hochtief AG, Royal Dutch Shell, Time Warner Inc., The Linde Group, Weyerhaeuser Company, The Williams Companies, Inc. and Xstrata plc. Mr. Hall's recent notable representations include Life Technologies Corporation in its pending sale to Thermo Fisher Scientific Inc. for US\$13.6 billion plus the assumption of net debt at close, The Linde Group in connection with its US\$4.6 billion acquisition of Lincare Holdings Inc. and the special committee of the independent directors of CNH Global N.V. as U.S. counsel in connection with the merger of Fiat Industrial S.p.A. and CNH Global with and into CNH Industrial N.V. He has also acted on behalf of Time Warner Inc. on M&A and regular corporate matters, including the recent separation of Time Warner Cable and AOL.

Mr. Hall has been repeatedly cited as one of the country's leading practitioners in mergers and acquisitions by, among others, *Chambers USA: America's Leading Lawyers for Business* from 2007 through 2013; *Chambers Global: The World's Leading Lawyers for Business* from 2007 through 2013; *The Legal 500 United States* from 2010 through 2013; *The Legal 500 Latin America* in 2012 and 2013; *IFLR1000: The Guide to the World's Leading Financial Law Firms* from 2005 through 2014; *The Best Lawyers in America* from 2007 through 2014; *Lawdragon's 500 Leading Lawyers in America* in 2011 and 2012; and *The International Who's Who of Merger & Acquisition Lawyers*. Mr. Hall has also been named by *The International Who's Who of Business Lawyers* as one of the ten "Most Highly Regarded Individuals" in mergers and acquisitions as well as corporate governance law. In addition, Cravath's mergers and acquisitions practice received a high ranking by *Chambers* for being "knowledgeable and responsive, with excellent levels of service." Mr. Hall also co-authored the U.S. section of *The Mergers and Acquisitions Review*.

Mr. Hall was born in Melbourne, Australia. He received a B.Comm. with honors in 1984, an LL.B. with honors in 1986 from the University of Melbourne, and an LL.M. from Harvard University in 1988. He joined Cravath in 1988 and became a partner in 1996.

About the Speakers

Stephen M. Kotran, Partner, *Sullivan & Cromwell LLP*

Steve Kotran represents buyers, sellers, special committees of independent directors and financial advisers in connection with mergers and acquisitions transactions, including negotiated and hostile acquisitions of public companies, negotiated sales of private companies, subsidiaries and divisions, private equity transactions, leveraged buy-outs, formation of joint ventures and asset sales. He has been consistently recognized as a leading M&A, private equity and insurance transactional lawyer by *Chambers*, *US Legal 500*, *The Best Lawyers in America*, *New York Super Lawyers*, *Lawdragon* and *IFLR*. Mr. Kotran is a frequent speaker on mergers and acquisitions and private equity matters for the Practising Law Institute, the New York City Bar Association, the Annual Institute on Corporate, Securities and Related Aspects of Mergers and Acquisitions, the University of Texas Law School's Annual Mergers and Acquisitions Institute and various other professional organizations and conferences. He is a member of the American Bar Association Business Law Section's Mergers & Acquisitions Committee (and Co-Chair of its Financial Advisor Task Force and a member of its Strategic Buyer/Public Target M&A Deal Points Study Working Group) and Committee on Federal Regulation of Securities. He also serves on the M&A Advisory Board of Practical Law.

About the Speakers

Tasha Hutchins, *Senior Editor, Practical Law Corporate & Securities*

Tasha Hutchins joined Practical Law from Pfizer Inc., where she worked as a corporate attorney specializing in M&A transactions for Pfizer's business transactions group. Previously she was a corporate associate at Dorsey & Whitney LLP. Before that, she worked in the M&A group at Skadden, Arps, Slate, Meagher & Flom LLP.