March 12, 2013

Board Enjoined From Impeding Consent Solicitation Until It Approves Insurgent Slate for Purposes of Credit Agreement

In *Kallick* v. *SandRidge Energy, Inc.*, the Delaware Court of Chancery, in an opinion by Chancellor Strine, enjoined the incumbent board of SandRidge Energy, which faced a consent solicitation initiated by a large stockholder seeking to de-stagger and replace the board, from, among other things, soliciting against or otherwise impeding the consent solicitation until the board approved the rival slate for purposes of a "proxy put" provision in SandRidge's credit agreements. The *Kallick* decision, along with the Court of Chancery's earlier decision in *San Antonio Fire & Police Pension Fund* v. *Amylin Pharmaceuticals*, confirm that corporations, as a matter of process, should carefully consider and review whether proxy put and other similar change-of-control provisions in credit agreements and indentures are truly in the best interests of the stockholders.

A large SandRidge stockholder launched a consent solicitation to seat a new board that was committed to changing management and exploring strategic alternatives for the company. The incumbent board resisted the consent solicitation, claiming that the rival slate was less qualified than the incumbents to run the company and warning stockholders that, because the slate had not been approved by the incumbent board, the election of the rival slate would constitute a change-of-control for purposes of SandRidge's credit agreements and would trigger the lenders' right to put $4.3 billion worth of notes back to the company (the "Proxy Put"). The board determined at that time that the triggering of the Proxy Put would cause economic harm to the company, but later changed its position, stating that the Proxy Put posed no danger, as the debt was trading at prices above the repurchase price associated with the Proxy Put (even though the debt was also trading above the repurchase price when the board announced its initial position of "economic harm").

The plaintiff, a SandRidge stockholder that supports the consent solicitation, brought suit, arguing that the incumbent board breached its fiduciary duties by failing to approve the rival slate so that such nominees if elected would not trigger the Proxy Put.

In addressing plaintiff's motion for a preliminary injunction, the court determined that intermediate scrutiny under *Unocal* is the proper standard of review, as the Proxy Put and the board's discretion under the change-of-control provision had clear defensive value. Because, as required by *Amylin*, the incumbent board could not identify a specific and substantial risk to the corporation or its creditors posed by the rival slate, the board was required by its duty of loyalty to approve the proposed slate for purposes of the Proxy Put, even if it believed itself to be better qualified and to have better plans for the corporation. Under *Amylin*, approval for purposes of the Proxy Put did not prevent the board from waging a defensive campaign against the rival slate. Further, the court noted that boards have a duty to "pay very close attention to provisions that affect the stockholder franchise, such as Proxy Puts." Given the foregoing, the court enjoined the incumbent board from (i) soliciting any further consent revocations, (ii) relying upon or otherwise giving effect to any consent revocations it had received to date; and (iii) impeding the

consent solicitation process in any way, unless and until the board approves the rival slate for purposes of the Proxy Put.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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