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2014 Amendments to the Delaware General Corporation Law

Effective August 1, 2014, the Delaware General Corporation Law will incorporate several important amendments that will be helpful to the deal and broader corporate community. The key changes include the following:

- Amending Section 251(h) "medium-form" merger procedures to enhance their usability (including by eliminating the prohibition against 15% "interested stockholders" being a party to the merger);
- Allowing board or stockholder actions by written consent to be effective at a future or contingent time and clarifying that a person signing a consent need not be a director at the time of execution so long as he or she is a director at the effective time of the consent; and
- Allowing corporations to amend their certificates of incorporation to effect name changes, delete references to the incorporator, initial board and initial stockholders and delete certain provisions related to capital structure changes, if such recapitalization already occurred, in each case without stockholder approval.

Amendment of Section 251(h) "Medium-Form" Merger Procedures to Enhance Usability

In 2013, Delaware adopted new Section 251(h), which eliminated the need for stockholder approval of second-step mergers following tender offers subject to specified conditions. The 2014 amendments to this rule make the provision more accessible to deal parties by doing the following:

- *Eliminating the prohibition against a party to the merger agreement being an "interested stockholder" as defined in Section 203 of the DGCL (in general terms, a 15% or more stockholder).* This will allow the use of Section 251(h) where it was previously prohibited or in doubt (for example, in controlling stockholder transactions or where a voting or tender agreement may create a 15% stockholder or stockholder group).
- *Clarifying which shares are "owned" by the acquirer for the purposes of determining whether the necessary voting threshold has been met to allow the consummation of the second-step merger without a vote.* Currently, Section 251(h) requires, as a condition to completion of the second-step merger without a stockholder vote, that, after the consummation of the first-step tender or exchange offer, the acquirer must "own" at least the percentage of stock that would be required to adopt the merger agreement under the DGCL and the target's governing documents. The 2014 amendments clarify that the stock that would be counted towards this threshold would be any stock actually owned by the consummating corporation and also any stock irrevocably accepted for purchase or exchange pursuant to the tender or exchange offer and "received" by the depository prior to the expiration of the offer (i.e., physical receipt of a stock certificate and transfer into the depository's account or, for uncertificated shares, receipt by the depository of an agent's message.)
- *Clarifying that target and acquirer-owned stock need not be included in the tender offer.* Currently, Section 251(h) requires that the first-step tender offer be for "any and all of the outstanding stock" of the target corporation. The 2014 amendments clarify that this may exclude target stock that is owned at the commencement of the offer by the target corporation itself, the acquirer, any parent of the acquirer (if wholly owned) and any subsidiaries of any of the foregoing.

- *Making the use of Section 251(h) permissive*. Previously, parties were required to state that its merger "shall" be governed by Section 251(h). The amended provision allows parties to state that the merger is permitted or required to be effected under Section 251(h), allowing parties flexibility in changing the deal structure if needed.

We note, however, that parties will still need to consider their ability to permit differential treatment for stockholders (e.g., via rollover arrangements or mix-and-match tender offers with pro-rationing mechanics) using these modified procedures.

Allowing Board or Stockholder Action by Written Consent with Future and Contingent Effective Times

Sections 141(f) and 228(c) of the DGCL are amended to clarify that board and stockholder actions by written consent, respectively, may be drafted to become effective at a future time (including a time to be determined by the happening of an event) that is no later than 60 days after the time of execution. This would be the case even if the person is not a director or stockholder at the time of the execution of the consent, so long as that person is a director at the effective time of the consent or a stockholder as of the record date, and such consent was not revoked in the interim. Anyone who has been involved in complex closings that require a carefully choreographed sequence of transactions and stockholder and board consents will welcome these amendments. The ability to execute a stockholder consent contingent on the happening of a future event may allow parties in an M&A transaction, for example, to better control, and possibly contract, the timing between board approval and recommendation, and the parties' execution, of a merger agreement, and the execution and effectiveness of a stockholder written consent.

Allowing Certain Amendments to the Certificate of Incorporation without Stockholder Approval

The 2014 amendments will allow companies to amend their certificates of incorporation to (i) effect a name change, (ii) delete references to the incorporator, initial board of directors and original subscribers for shares or (iii) delete provisions necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such transactions are already effective, all without stockholder approval unless the certificate of incorporation expressly requires otherwise. In a related change, new Section 108(d) clarifies that if an incorporator is unavailable to act, any person for whom or on whose behalf that incorporator was acting may take any action that such incorporator would have been authorized to take. Finally, the 2014 amendments clarify that any stockholder notice regarding a meeting to consider amendments to the certificate of incorporation must contain a summary of the proposed changes, unless the notice is a notice of internet availability of proxy materials as required by the SEC's proxy rules.

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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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