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Delaware Court of Chancery Holds that Transaction Price Was Not a Reliable Proxy for Fair Value in Appraisal Decision

In *In re Appraisal of Dell Inc.*, the Court of Chancery held that, for purposes of Delaware's appraisal statute, the fair value of the common stock of Dell Inc. at the time of its sale to a group including the Company's founder Michael Dell was $17.62 per share, almost a third higher than the $13.75 deal price. Importantly, in so holding, the Court found that the deal price was not a reliable proxy for fair value for various reasons, including, among other reasons, that the transaction was a management buyout, the only active bidders were financial (not strategic buyers), there was limited pre-signing competition for the Company and the effectiveness of the post-signing go-shop period was limited by the size and complexity of the Company. While this decision was a departure from recent appraisal decisions by the Court that relied heavily or exclusively on transaction price as evidence of fair value, the Court distinguished this case from those decisions because those prior situations did not involve MBOs and involved either a more active pre-signing market check or an unsolicited third-party bid. In those decisions, or where the target company can show that the pre-transaction market price of its stock reflected legitimate doubts about the target's prospects, as opposed to "myopia," the transaction price might well be regarded as compelling evidence of fair value. For more, click here.

Delaware Court of Chancery Holds that Outside Counsel's Refusal to Render Tax Opinion Required for Closing of Merger Was in Good Faith and Permits Termination of Merger Agreement

In *The Williams Companies, Inc.* v. *Energy Transfer Equity, L.P., et al.*, the Court of Chancery held that an acquirer in a merger did not fail to use "commercially reasonable efforts" to obtain a tax opinion from its tax counsel, receipt of which was a closing condition, where, as a factual matter, the Court concluded that acquirer tax counsel's refusal to render the opinion was in good faith. The Court therefore permitted the acquirer to terminate the merger agreement by an outside date if the acquirer could not obtain the tax opinion. The acquirer in fact terminated the merger agreement on June 29, 2016. Although the Court's decision has received great attention, the outcome rested heavily on the unique facts of the case at hand, including the precipitous drop in energy prices after the signing of the merger agreement and the Court's credibility findings with respect to trial witnesses. For more, click here.

Delaware Court of Chancery Holds that Board Decision to Disregard Speculative Projections Not Bad Faith

In *In re Chelsea Therapeutics International Ltd. Stockholder Litigation*, the Court of Chancery dismissed claims that the board of a target company acted in bad faith and breached its duty of loyalty by instructing its financial advisor to disregard certain speculative projections in connection with the advisors' valuation analysis, noting that successful fiduciary duty claims based on allegations of bad faith are rare. For more, click here.

Supreme Court Confirms Cleansing Effect of Fully Informed, Disinterested Stockholder Vote to Invoke Business Judgment Review in Non-Control Transactions; and Court of Chancery Extends Holding to Tendering Stockholders in a "Medium Form" Merger

In *Singh* v. *Attenborough*, the Supreme Court (applying *Corwin* v. *KKR Financial Holdings LLC* (discussed here)) upheld the dismissal of breach of fiduciary duty claims against directors of a target corporation and aiding and abetting claims against the target's financial advisor in connection with a merger that was approved by a fully informed, uncoerced vote of the corporation's disinterested stockholders and to which entire fairness review does not apply (*e.g.*, a merger without a controlling stockholder). In doing so, the Supreme Court clarified that, absent waste, the business judgment rule is invoked in these circumstances and that breach of fiduciary duty claims typically should be dismissed. The Supreme Court also emphasized the high standard required to plead scienter in order to allege an aiding and abetting claim against a financial advisor. For more, click here.

Later this quarter, in *In re Volcano Corporation Stockholder Litigation*, the Court of Chancery extended the holdings from *Singh* to so-called "medium form" mergers under Section 251(h) of the Delaware General Corporation Law (the "DGCL"). The Court held that the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) had the same cleansing effect as a fully informed, uncoerced vote of a majority of the disinterested stockholders of a target corporation in a merger. Upon the receipt of the required tendered shares, the business judgment rule "irrebuttably" applied to the merger and the plaintiff could only challenge it on the basis that it constituted waste. For more, click here.

Delaware Court of Chancery Preliminarily Enjoins Board Reduction Plan Sought to Ward Off a Proxy Contest

In *Pell* v. *Kill*, the Court of Chancery preliminarily enjoined directors of Cogentix Medical Inc. from implementing a board reduction plan that was aimed at warding off a proxy contest. The Court preliminarily enjoined the plan, which sought to reduce the board from eight to five members, as it inhibited the stockholders' ability to vote at an annual election and precluded the establishment of a new board majority. For the decision, click here.

2016 Amendments to the Delaware General Corporation Law

On June 16, 2016, Delaware's governor signed into law the 2016 amendments to the DGCL, which notably include amendments to Section 251(h) (provisions governing "intermediate-form" mergers) and Section 262 (the appraisal statute). The amendments (other than the amendments to Section 251(h) and Section 262) will become effective on August 1, 2016. The amendments to Section 251(h) will be effective only with respect to merger agreements entered into on or after August 1, 2016. The amendments to Section 262 will be effective only with respect to transactions

consummated pursuant to agreements entered into on or after August 1, 2016 (or, in the case of mergers pursuant to Section 253 of the DGCL, resolutions of the board of directors adopted on or after August 1, 2016 or, in the case of mergers pursuant to Section 267 of the DGCL, authorizations provided on or after August 1, 2016).

The 2016 amendments of particular note for M&A practitioners include the following:

- Section 251(h) – The 2016 amendments amend the provisions relating to so-called "intermediate-form" mergers to clarify that:
  - Section 251(h) applies to any target corporation with *any* class or series of stock (not *all* classes or series of stock) listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to execution of the merger agreement;
  - the offer for the stock of the target corporation contemplated by Section 251(h) may be effected through separate offers for separate classes or series of stock;
  - the offer may include a minimum tender condition;
  - shares held by "offeror affiliates" and "rollover stock" would be counted in determining whether the offeror has sufficient shares that, absent Section 251(h), would be required to adopt the merger agreement; and
  - target shares are deemed to be "received" by the offeror upon (i) with respect to certificated shares, physical receipt of a stock certificate accompanied by an executed letter of transmittal, (ii) with respect to uncertificated shares held of record by a clearing corporation as nominee, transfer into the depository's account by means of an agent's message, and (iii) with respect to uncertificated shares not so held, receipt of an executed letter of transmittal by the depository. Shares will cease to be "received" (i) in the case of certificated shares, if the certificate representing such shares was canceled prior to consummation of the offer, and (ii) with respect to uncertificated shares, to the extent such uncertificated shares have been reduced or eliminated due to any sale of such shares prior to the consummation of the offer.

- Section 262 – The amendments to Section 262 of the DGCL are substantially similar to those proposed in 2015 and attempt to address concerns over the increase in appraisal actions that are in part driven by appraisal arbitrage investment strategies. These amendments:
  - limit the right to bring an appraisal proceeding with respect to publicly traded companies if the claim is *de minimis*. Appraisal proceedings shall be dismissed unless:
    - The total number of shares entitled to appraisal exceeds 1% of the outstanding shares that could have sought appraisal,
    - The value of the merger consideration for the total number of shares entitled to appraisal exceeds $1 million, or
    - The merger is a parent/subsidiary merger approved under Sections 253 or 267 of the DGCL.
  - allow corporations to pay stockholders pursuing an appraisal claim an amount chosen by the corporation and thereby cutting off the accrual of interest on the amount paid.

The 2016 amendments to the DGCL also include changes to:

- Section 111 of the DGCL to give the Delaware Court of Chancery jurisdiction over certain stock and asset transaction agreements;

- Section 141 of the DGCL to set certain rules governing committees of a board of directors (including the quorum needed to take action);
- Section 158 of the DGCL relating to the required signatories on the certificates evidencing stock in a Delaware corporation; and
- Sections 104 and 311 through 314 of the DGCL that are aimed at clarifying and simplifying the corporate revival and restoration process and to provide consistency within the provisions DGCL with respect thereto.

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- April 2016
- May 2016
- June 2016

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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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