Delaware Corporate Counseling Group
Report
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Section 251(h) Year in Review

Section 251(h) of the Delaware General Corporation Law (the "DGCL") took effect just over a year ago. That statute was designed effectively to permit a simultaneous closing of the front-end tender or exchange offer and back-end merger in a two-step transaction if certain preconditions – notably, that a sufficient number of shares are tendered in the offer – are satisfied. In this report, we survey some of our observations on the use of Section 251(h) over the past year, both generally and with respect to specific merger provisions, and discuss statutory amendments to Section 251(h) that took effect August 1, 2014 (the "2014 Amendments").

I. Section 251(h) – A Brief Primer

Acquisitions by merger generally take the form of either a one-step or a two-step transaction. Section 251(h) addresses two-step transaction structures – those involving a front-end tender or exchange offer and a back-end merger.

Both before and after the adoption of Section 251(h), the front-end offer in a two-step transaction generally would not close unless, following consummation of the offer, the acquiror owned at least the amount of stock necessary to approve the back-end merger. As a result, after consummation of the offer, the back-end merger, at least as it relates to corporate approval, would be a *fait accompli*. Prior to the adoption of Section 251(h), unless the acquiror could obtain 90% of each class of outstanding voting stock (the short-form merger threshold) through the offer (and any "top-up option" or subsequent offering period), the closing of the back-end merger would require a stockholder meeting. This could result in a delay to closing the back-end merger of two to four months notwithstanding that the approval of that merger was a foregone conclusion. Section 251(h), when adopted, obviated the need for this delay by permitting a merger agreement to contain a provision allowing for the back-end merger to be effected without a stockholder vote if certain conditions were satisfied. Those conditions, as existing before the 2014 Amendments, included:

- **Target a Public Company:** The target must be a public corporation. This condition – effected by requiring that the target's shares be listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the merger agreement – is designed to ensure that a two-step transaction effected pursuant to Section 251(h) is subject to all of the disclosure and procedural safeguards required by federal securities laws and regulations.

- **Third-Party Acquisition:** As originally drafted, Section 251(h) was intended only to be applicable to true third party acquisitions (and not, *e.g.*, to squeeze out transactions initiated by controlling or other large stockholders who would roll a large portion of their target stock into surviving company equity). To achieve this goal, Section 251(h) utilized the definition of "interested stockholder" in Section 203 of the DGCL, and required that the acquiror not be an interested stockholder at the time the merger agreement is approved by the target board. As discussed further below, this particular condition caused concern to some practitioners.

- **Opt-in:** The constituent corporations must opt-in to Section 251(h) by inclusion of a provision to that effect in the merger agreement; Section 251(h) would not apply by default. Prior to the adoption of Section 251(h), constituent entities could negotiate for other (although less effective) methods to mitigate the delay between closing of the front-end offer and back-end merger (*e.g.*, subsequent offering periods and top-up options). The opt-in requirement was designed to allow constituent parties to negotiate as to the applicability of Section 251(h), just as they could have negotiated over the applicability of the pre-Section 251(h) methods of mitigating the delay.

- **Structure of Tender or Exchange Offer:** The statute required that (i) the front-end offer be for "any and all" of the target's outstanding voting stock and that (ii) any shares not canceled in the merger be converted into the right to receive the same consideration paid for shares in the front-end offer. This requirement was designed to make Section 251(h) inapplicable to coercive transaction structures (such as a front-end loaded, two-tier offer). Despite the use of the word "any," the requirement does not preclude a minimum tender condition.
- **Requisite Level of Support:** The lynchpin of the statute is the condition that the stockholders tender into the offer the amount and kind of shares that, when coupled with shares previously owned by the acquiror, otherwise would have been necessary to approve the merger both under the DGCL and pursuant to the target's certificate of incorporation.
- **Back-End Merger Consummated Quickly:** Because Section 251(h) was designed to mitigate the time between closing of the front-end offer and the back-end merger, a condition to its use is that the parties agree in the merger agreement to effect the back-end merger "as soon as practicable" after consummation of the front-end offer.

II. Section 251(h) Market Data[1]

During the first 12 months after Section 251(h) took effect,[2] 35 total merger agreements, or 34% of all M&A transactions involving public Delaware corporations as targets, employed a Section 251(h) structure.[3] By comparison, during the pre-adoption year, traditional two-step structures were employed in only 23% of M&A transactions involving public Delaware corporations as targets.

Pre-Adoption		Post-Adoption	
Total Agreements:	**127**	Total Agreements:	**103**
Non-Section 251(h) Two-Step Agreements:	30	Non-Section 251(h) Two-Step Agreements:	4
% of Total Agreements:	23%	% of Total Agreements:	4%
Section 251(h) Agreements:	N/A	Section 251(h) Agreements:	35
% of Total Agreements:	N/A	% of Total Agreements:	34%

1 The observations herein are based on data compiled from FactSet/MergerMetrics.

2 Section 251(h) first took effect on August 1, 2013. We refer to the 12-month periods before and after Section 251(h) took effect, respectively, as the "pre-adoption" and "post-adoption" years.

3 "Deal activity" and "transactions" are measured by the number of signed merger agreements, and not by consummated transactions. Accordingly, the 35 total Section 251(h) transactions we report includes two merger agreements that were terminated in favor of superior proposals (both of which ultimately resulted in Section 251(h) merger agreements of their own). Those two terminated transactions were Endo Health Solutions Inc.'s approximately $188 million acquisition of NuPathe Inc. signed on December 15, 2013 (withdrawn in favor of Teva Pharmaceutical Industries Limited's approximately $213 million offer) and Imerys SA's approximately $1.471 billion acquisition of AMCOL International Corp. signed on February 11, 2014 (withdrawn in favor of Minerals Technologies Inc.'s approximately $1.487 billion offer). A complete list of the precedent Section 251(h) agreements reviewed in this report is provided on **Appendix A**. Additionally, among the dataset of total merger agreements entered into during the post-adoption year was one inversion transaction—Salix Pharmaceuticals, Ltd.'s acquisition by Cosmo Pharmaceuticals S.p.A., dated as of July 8, 2014—for which FactSet/MergerMetrics does not provide a disclosed transaction value. For purposes of this report, we have included this transaction in reporting overall deal activity, but excluded it in calculating deal value statistics.

A. Section 251(h) Non-Use Transactions

Sixty-eight of the total 103 merger agreements involving public Delaware corporations as targets entered into during the post-adoption year, or approximately two-thirds, did not use Section 251(h). We refer to these transactions as "Section 251(h) Non-Use Transactions." In general, the determination not to employ Section 251(h) may have been attributable to one of two principal factors: (1) entering into support agreements in excess of 15% of the target's outstanding common shares and (2) deal size.

1. Tender and support agreements

As discussed above, as originally drafted, Section 251(h) was intended only to be applicable to true third party acquisitions, and the statute used the definition of "interested stockholder" in Section 203 of the DGCL to achieve that goal. Specifically, Section 251(h) originally provided that it would be inapplicable if, at the time the target's board approved the merger agreement, another party to the merger agreement was an "interested stockholder," as defined in Section 203 of the DGCL. Section 203, in turn, defines an "interested stockholder" to include the "owner" of 15% or more of the target company's outstanding voting stock, with ownership being attributed by way of "agreements, arrangements or understandings" with respect to the voting or disposition of target shares.

Subsequent to adoption of Section 251(h), some concern was raised that, even if a support agreement with a large target stockholder was negotiated indirectly by the acquiror through the target (and not with the stockholder), was not signed prior to target board approval of the merger agreement, and was conditioned upon target board approval of the merger agreement, an argument could be made that an "understanding" with respect to the disposition of the subject shares existed between the stockholder and the acquiror prior to target board approval of the merger agreement. As a result, if support agreements with the acquiror (together with whatever target stock the acquiror already held) equaled 15% or more of the target's outstanding voting stock, the acquiror would be an "interested stockholder" and disqualified from using Section 251(h).

Thirty-three of the total 68 Section 251(h) Non-Use Transactions, or 49%, involved tender or support agreements representing 15% or more of the target's outstanding shares. As discussed further below, the 2014 Amendments repealed the "interested stockholder" restriction.

2. Deal Size

Other than the presence of support agreements, the most significant distinguishing characteristic of the Section 251(h) Non-Use Transactions appears to be deal size, as reflected in the below chart.

	All Agreements	Section 251(h) Agreements	All Non-Use Transactions	Non-Use Transactions without Support Agreements ≥ 15%
Mean Value:	$ 2,828	$ 1,240	$ 3,734	$ 6,301
Median Value:	$ 693	$ 807	$ 574	$ 1,470
Top 25% Value:	$ 1,826	$ 1,429	$ 2,345	$ 5,966
Bottom 25% Value:	$ 257	$ 285	$ 235	$ 252

All dollar values in $ millions.

We cannot say beyond mere speculation what drives this discrepancy. One very loose correlation may be that, the larger the deal the more likely there are regulatory issues that would have steered transaction planners toward a one-step transaction regardless of the existence of Section 251(h).

III. 2014 Amendments

With almost a year's experience of Section 251(h) under its belt, in the summer of 2014, the Delaware General Assembly, with the assistance of the Corporation Law Council of the Delaware State Bar Association, revisited the initial language of Section 251(h). The result was the 2014 Amendments, which are effective as to any merger agreement entered into on or after August 1, 2014. A brief summary of those Amendments follows.[4]

1. Elimination of "interested stockholder" restriction

As discussed above, as initially adopted, Section 251(h) was inapplicable if, at the time the target's board approved the merger agreement, another party to the merger agreement was an "interested stockholder," as defined in Section 203 of the DGCL. The 2014 Amendments eliminate this restriction in its entirety.

Although the cross-reference to Section 203's definition of "interested stockholder" as an express condition on the availability of Section 251(h) has been removed, the restrictions on business combinations with interested stockholders contained in Section 203 do remain applicable to the same extent they would have been regardless of Section 251(h). Practitioners, as always, should remain mindful of navigating these potential restrictions.

2. Clarification to the opt-in

As discussed above, Section 251(h) requires some type of explicit election into its regime; it does not apply by default. The original version of Section 251(h) effected this opt-in condition by requiring that the merger agreement provide that the merger "shall be governed by" Section 251(h).

Seven Section 251(h) agreements from the post-adoption year contained variations of what we refer to as a "251(h) inapplicable determination" provision. In varying terms, these provisions opt into Section 251(h) but provide alternative mechanics to close the back-end merger if proceeding under Section 251(h) becomes unavailable for any reason. Although we observed these provisions primarily during the early months after Section 251(h) took effect, one of these provisions was observed within a Section 251(h) agreement as recently as July 2014. Additionally, beginning in June 2014, we saw a variation on the 251(h) inapplicable determination provision; rather than providing an alternative if Section 251(h) becomes unavailable, these latter agreements provided that the merger would be effected under DGCL Section 253, the short-form statute, if 90% or more of the outstanding shares were tendered into the front-end offer, but that the merger could close under Section 251(h) if the tender amount was less than 90%.[5]

The "opt-in condition" was intended to make Section 251(h) an elective statute; it was not intended to compel merger agreements to be governed by Section 251(h) exclusively. To clarify this point – *i.e.*, that the use of the word "shall" in the original text of Section 251(h) was not intended to compel an exclusive transaction structure – the 2014 Amendments amend the opt-in condition as follows:

> (1) The agreement of merger, ~~which must be entered into on or after August 1, 2013~~, expressly (i) permits or requires such merger to be effected under this subsection and (ii) provides that such merger ~~shall be governed by this subsection and~~ shall be effected as soon as practicable following the consummation of the offer referred to in paragraph (h)(2) of this section if such merger is effected under this subsection;

3. Streamlining the closing procedures

Despite Section 251(h)'s intent to allow for simultaneous closing of the front- and back-ends of a two-step transaction, practical impediments to simultaneous closings remained under the original text of Section 251(h). The 2014 Amendments are drafted to mitigate two of those impediments.

4 Attached as **Appendix B** is a blackline marking all changes to Section 251(h) made by the 2014 Amendments.

5 None of these recent variations on the 251(h) inapplicable determination provision has been accompanied by a top-up option to ensure that the short-form threshold is reached.

First, the 2014 Amendments clarify that "consummation" of the front-end offer – a condition to the applicability of Section 251(h) – occurs upon acceptance of the tendered shares, and does not require actual settlement and payment. Thus, tendered shares can be accepted, but payment for both shares tendered in the front-end offer and shares converted in the back-end merger can occur simultaneously.[6] To effect this outcome, the closing of the back-end merger should be conditioned only upon *consummation* of the front-end offer (as defined in now-effective Section 251(h)), and not on both acceptance of, and payment for, shares tendered in the front-end offer.

Second, both before and after the 2014 Amendments, the ability to effect a back-end merger without a stockholder vote under Section 251(h) depends on the acquiror satisfying a minimum "ownership" threshold. Prior to the 2014 Amendments, "ownership" was not defined in Section 251(h), and some practitioners expressed skepticism that they timely could reflect the transfer of record ownership of tendered shares on the target's stock ledger – the traditional method of demonstrating "ownership" under the DGCL.[7] To address this issue, subparagraph (3) of Section 251(h) has been revised to include references to shares held by a depository, clarifying that actual ownership by way of registered transfer on the target's stock ledger is not necessary to satisfy the statute's "ownership" requirement. Specifically, subparagraph (3) now refers to "stock irrevocably accepted for purchase or exchange pursuant to such offer and received by the depository prior to expiration of such offer" in describing the statutory minimum tender condition. Concomitant with these changes, the legislature clarified that stock tendered by notice of guaranteed delivery should not be included in the numerator in determining whether the statutory minimum tender condition is satisfied; this was accomplished through the introduction of statutory definitions for "depository" and "received." Practitioners should note that this provision applies only to shares tendered into the offer; it does not apply to target shares the acquiror otherwise "owns" that it wishes to be aggregated for purposes of determining whether the statutory minimum tender condition is satisfied.

4. Treatment of certain shares in the back-end merger

As originally enacted, Section 251(h) required that the front-end offer be made for "any and all" of the target's voting stock, and that all shares "not to be canceled in the [back-end] merger . . . be converted in such merger into, or into the right to receive, the same [consideration] paid for such class or series of stock of [the target] corporation upon consummation of the [front-end] offer." Over the past year, some practitioners expressed a desire to allow target shares owned by the target and its subsidiaries and by the acquiror and its subsidiaries to be treated in a manner other than cancellation or conversion into the merger consideration (*e.g.*, to be converted into shares of the surviving corporation and remain outstanding).

The 2014 Amendments address this issue by providing in subparagraph (2) that the front-end offer may exclude shares held by the transacting parties and their subsidiaries at the commencement of the offer. In turn, (new) subparagraph (5) (renumbered to account for the repeal of the interested stockholder limitation), by limiting the "equal treatment" requirement to shares "subject of and not irrevocably accepted" for purchase in the offer now allows for alternative treatment of shares not subject to the offer as now permitted by subparagraph (2). Taken together, these changes allow target shares held by the transacting parties and their subsidiaries to, among other things, remain outstanding as surviving company shares, be cancelled, or be converted into the merger consideration. Taking advantage of these revisions requires drafting the front-end offer documents affirmatively to exclude shares from the offer. Otherwise, such as in the case of an unequivocal "any and all shares" offer, these shares would be "the subject of . . . the offer referred to in paragraph (h)(2)" and, under subparagraph (5), would have to be treated in the same manner as all other tendered shares.

6 Our understanding is allowing payment for shares acquired through the front-end offer to be delayed until the back-end merger is completed will be especially useful in transactions where, in order to obtain financing (including of the front-end offer), 100% of the target stock needs to be pledged as collateral.

7 *See* 8 *Del. C.* § 219(c) ("The stock ledger shall be the only evidence as to who are the stockholders entitled . . . to vote in person or by proxy at any meeting of stockholders.").

5. Issues not addressed in the 2014 Amendments

Although the 2014 Amendments addressed several issues raised by practitioners during the first year of experience with Section 251(h), the Delaware General Assembly, working with the Corporation Law Council of the Delaware State Bar Association, considered but did not address others. Two bear mentioning.

First, Section 251(h) continues to refer exclusively to mergers involving two constituent "corporations." Consequently, to structure a transaction under Section 251(h), *both* the target *and* the acquisition vehicle making the front-end offer and with which the target will be merged must be Delaware corporations. To structure a two-step transaction with an alternative entity functioning as the acquisition vehicle, transaction planners remain limited to statutory short-form mergers under DGCL Section 267 and the mechanics for implementing a top-up option to reach the 90% threshold.

Second, during the course of the past year, some transaction planners observed that, because federal securities laws and regulations require rollover arrangements to be consummated *after* the close of the front-end offer, rollover shares would not be included in the numerator when determining whether the statutory minimum tender condition was satisfied. Two-step transactions prior to Section 251(h) addressed this issue contractually by defining the minimum tender condition in the merger agreement to account for rollover shares. Although, as discussed above, the 2014 Amendments do depart from the more traditional statutory definition of ownership slightly so that shares *actually tendered* into the offer are included in the numerator, the 2014 Amendments do not move beyond that to include rollover shares in the numerator. Thus, unless other changes are made to Section 251(h) or the federal securities laws or regulations are amended to allow for the rollover to occur immediately prior to close of the front-end offer, Section 251(h) may prove unattractive in transactions involving large rollover components.

IV. Specific Merger Agreement Provisions

In the remainder of this report, we discuss some specific contract drafting issues that may arise in the context of a Section 251(h) transaction.

A. Defining the "Minimum Condition"

Unless the target charter contains a high-vote requirement or a higher vote is otherwise required (*e.g.*, due to the restrictions on business combinations in Section 203), the statutory minimum tender condition is "a majority of the outstanding stock" of the target that, but for Section 251(h), would be entitled to vote on adoption of the merger agreement. Because this requirement is measured at the moment in time "following the consummation" of the offer, and because holders of options, warrants, and other convertible rights do not possess voting rights until exercise or conversion actually occurs, the statute allows the minimum condition for the front-end offer to be defined merely as a majority of the shares actually outstanding – *i.e.*, not as a majority of the shares outstanding *on a fully diluted basis*.

Nonetheless, all but six of the Section 251(h) agreements to date have defined the minimum condition using a fully diluted construct. This may be a vestige of pre-Section 251(h) two-step transactions, where the back-end merger might occur months after the closing of the front-end offer and the possibility of dilution below a majority of the outstanding shares during the period between closing of the first and second steps was a possibility. That possibility is nonexistent in Section 251(h) mergers. Although nothing in Section 251(h) prohibits merger agreements from containing the higher "majority of the fully diluted" (as opposed to "majority of the outstanding") condition, this is in actuality a higher condition than the statute requires.

B. Appraisal Rights

An additional clarification from the pre-Section 251(h) world is that, in a Section 251(h) transaction, a notice of appraisal rights may be sent and the subsequent appraisal demand period may expire *at the time the front-end offer is consummated*. Accordingly, immediately before closing the front-end offer and accepting the tendered shares, the acquiror can be in a position to know precisely how many appraisal demands have been made and, in turn, condition the closing of the offer on a maximum percentage of the target's shares demanding appraisal – *i.e.*, the merger agreement can contain an appraisal out.

Specifically, both before and after adoption of Section 251(h), Section 262(d)(2) of the DGCL contemplated notice of appraisal rights to be sent after the merger is "approved." In the Section 251(h) context, this refers to board approval of the merger (because the need for approval of the back-end merger has been obviated) – which occurs prior to the front-end offer being launched. Moreover, concomitant with the adoption of Section 251(h), Section 262(d)(2) was amended to provide that, "in the case of a merger approved pursuant to § 251(h)," a stockholder must demand appraisal "within the later of the consummation of the tender or exchange offer contemplated by § 251(h) of this title and 20 days after the date of mailing of " the notice of appraisal rights. Therefore, if the target mails a valid notice of appraisal more than twenty days before the expiration of the front-end offer, consummation of the offer effectively cuts off all further appraisal demands.

Despite the ability under Sections 251(h) and 262(d)(2) to include an appraisal out condition in the front-end offer, only one Section 251(h) agreement, or approximately 2.8% of the total Section 251(h) agreements to date, has taken advantage of this ability.[8] By comparison, there were four non-Section 251(h) agreements, or approximately 5.4% of all non-Section 251(h) deals, during the post-adoption year that provided for appraisal outs.[9]

Regardless of whether an appraisal out is utilized, practitioners seeking to send out a notice of appraisal rights (generally in a Schedule 14D-9), and thus complete the appraisal demand period upon the expiration of the front-end offer should be aware of at least two technical issues.

First, the Schedule 14D-9, and not the Schedule TO, should include the formal notice of appraisal rights. Although the Delaware appraisal statute permits "a constituent corporation" to provide notice of appraisal before the merger takes effect, which seems to suggest that the acquisition vehicle could provide notice in its offer documents, the statute goes on to specify that notice must be given to stockholders "of *such* constituent corporation who are entitled to appraisal rights." Accordingly, the *acquiror's* offer documents are insufficient to provide notice to the *target's* stockholders of the availability of appraisal rights.

Second, practitioners should be aware that the Delaware appraisal statute contains its own record date concept separate and apart from Section 213 of the DGCL, which governs record dates for items such as stockholder votes, actions by written consent and payments of dividends. Specifically, Section 262(d)(2) provides that, "[i]f no record date is fixed and the notice [of appraisal] is given prior to the effective date [of the back end merger], the record date shall be the close of business on the day next preceding the day on which notice is given." We understand that this default record date provision may create difficulties in that the mailing of the Schedule 14D-9 recommendation statement sometimes occurs over more than one day (such that it is difficult to ascertain exactly what the record date is) and, in any event, mailing labels for sending recommendation statements to stockholders will need to be prepared before mailing can occur (thus allowing some time for shares to change

8 That transaction was Nielsen Holdings N.V.'s approximately $118 million acquisition of Harris Interactive Inc., signed on November 25, 2013 and imposing a 13% appraisal out condition on the front end offer.

9 These four transactions were Dentsu Inc.'s approximately $24 million acquisition of mktg, inc., signed on May 27, 2014, Energy XXI (Bermuda) Limited's approximately $1.529 billion acquisition of EPL Oil & Gas, Inc., signed on March 12, 2014, Prosperity Bancshares, Inc.'s approximately $244 million acquisition of F&M Bancorporation, Inc., signed on August 29, 2013, and the approximately $1 million management led buyout of Marlborough Software Development Holdings Inc., signed on August 20, 2013. Of these four transactions, the size of the appraisal out ranged from no more than 5% to 10% of the outstanding shares demanding appraisal.

hands between printing of the mailing labels and actual mailing). These difficulties may be lessened to some extent in that the express requirement of sending appraisal notices applies only to record, and not beneficial, owners. Nonetheless, to eliminate these difficulties altogether, the target could set a record date in advance of mailing. The only statutory limitation in this respect is that the record date "shall be not more than 10 days prior to the date that notice is given." Relatedly, because a buyer may in effect be on the hook for the target's failure to comply with the statutory record date and mailing requirements, it may seek to ensure contractually that the target's board does set a record date in this manner. An example is as follows:

> The Company shall file with the SEC . . . a Solicitation/Recommendation Statement on Schedule 14D-9 pertaining to the Offer (together with any amendments or supplements thereto, the "Schedule 14D-9") that contains . . . the notice and other information required by Section 262(d)(2) of the Corporation Law, and shall promptly disseminate the Schedule 14D-9 to the holders of Shares as and to the extent required by applicable Law, *including by setting the Stockholder List Date (as defined below) as the record date for the purpose of receiving the notice required by Section 262(d)(2) of the Corporation Law*. . . .
>
> The Company shall . . . provide to Parent . . . a list of the holders of Shares as well as mailing labels and any available listing or computer file containing the names and addresses of all record and beneficial holders of Shares . . . in order to communicate the Offer to the holders of Shares (*the date of the list used to determine the Persons to whom the Offer Documents and Schedule 14D-9 are first disseminated, the "Stockholder List Date"*).[10]

Regardless of whether such a record date covenant is included, if it is desired that the Schedule 14D-9 serve as the notice of appraisal rights, counsel to targets may want to include in the target board resolutions a resolution either setting the record date for determining stockholders entitled to receive the notice of appraisal rights or establishing a committee of one or more directors to establish that date prior to mailing.

C. Extension Rights

An additional set of provisions we tracked in the precedent Section 251(h) agreements was the target's rights (1) to *require* the acquiror to extend the front-end offer if the minimum tender condition remained unsatisfied as of any then-scheduled expiration time and (2) to *prevent* the acquiror from extending the offer if the only unsatisfied condition is the minimum tender condition. Although these types of provisions were heavily negotiated pre-Section 251(h), we include them here because, in a sense, Section 251(h) equates "tender" with "vote"; thus, the ability to force the acquiror to extend the tender offer if the minimum tender condition is not satisfied, as well as the acquiror's ability unilaterally to extend the offer in those circumstances, is akin to, respectively, the ability of the target to delay a stockholder meeting to solicit more votes and the ability of the acquiror to force multiple "votes" upon the stockholders.

All but one of the precedent Section 251(h) agreements provided the target with *some* contractual right to require the acquiror to keep the front-end offer open if any condition – including the minimum tender condition – remained unsatisfied. In general, although the length of extension periods varied from between five to twenty day increments, the typical provision permitted the target to compel such extensions until the outside date of the agreement. This was the case in 33 of the total 34 agreements providing the target with the right to require the acquiror to extend the offer.[11] A caveat applies to at least four of those agreements, however. Whereas

10 *See* Cadence Pharms., Inc., Current Report (Form 8-K) Ex. 2.1 § 1.02(a) & (b) (Feb. 11, 2014) (emphasis added).

11 In the remaining agreement, the target had the contractual right to force the acquiror to extend the offer only twice in increments of no more than five days each.

typically the outside date was "hard wired" into the extension right such that the target had no right to force an extension past the outside date, in these four instances the target's extension right was limited only by the parties' respective rights to terminate the agreement. In turn, while both sides initially possessed the right to terminate the agreement if the offer had not closed by the outside date, a party could not terminate if that party was responsible for the failure to close. Accordingly, as to these four agreements, the targets conceivably possessed the right to force extensions even beyond the agreements' outside dates if the acquirors were responsible for an offer condition remaining unsatisfied.

In contrast to the ubiquity of provisions empowering the target to force an extension of the front-end offer, only a minority of the agreements (11 out of 35) included provisions allowing the target to limit the acquiror's ability to extend the offer if the minimum tender condition is the only unsatisfied condition. Among these 11 agreements, we also observed a fair degree of variety in terms of both the extent of the target's rights in this regard as well as the drafting chosen to provide it:

- Two agreements permitted the acquiror to extend the offer only with the target's consent;
- One agreement permitted a unilateral extension by the acquiror for one five-day period;
- One agreement permitted unilateral extensions by the acquiror for no more than two five-day periods;
- Five agreements permitted unilateral extensions by the acquiror for no more than 20 days, although drafting varied among the agreements (*e.g.*, by limiting the acquiror to no more than four extensions of up to five days each, to two extensions of up to ten days each, etc.); and
- Two agreements permitted unilateral extensions by the acquiror for no more than 40 days, again with drafting variations between the agreements.

V. Conclusion

In the over one year since Section 251(h) became effective, it has been well received by transaction planners. The 2014 Amendments should make it even more so. We expect to see continued refinements in Section 251(h) merger agreements as transaction planners continue their experience with this structure.

APPENDIX A **Precedent Transactions**

Signing Date	Target	Buyer
7/1/2014	Vitacost.com, Inc.	The Kroger Co.
6/23/2014	PLX Technology, Inc.	Avago Technologies Wireless (U.S.A.) Manufacturing Inc.
6/16/2014	Fusion-io, Inc.	SanDisk Corporation
6/12/2014	OpenTable, Inc.	The Priceline Group, Inc.
6/9/2014	Hittite Microwave Corp.	Analog Devices, Inc.
6/8/2014	Idenix Pharmaceuticals, Inc.	Merck & Co., Inc.
5/7/2014	Chelsea Therapeutics International, Ltd.	H. Lundbeck A/S
3/11/2014	Jos. A. Bank Clothiers, Inc.	The Men's Wearhouse, Inc.
3/10/2014	AMCOL International Corp.	Minerals Technologies, Inc.
2/11/2014	AMCOL International Corp.	Imerys SA
2/10/2014	Cadence Pharmaceuticals, Inc.	Mallinckrodt plc
1/30/2014	Accelrys, Inc.	Dassault Systemes Americas Corp.
1/17/2014	NuPathe Inc.	Teva Pharmaceutical Industries Ltd.
1/9/2014	American Pacific Corp.	H.I.G. Capital, LLC
12/20/2013	Tufco Technologies, Inc.	Griffin Holdings, LLC
12/20/2013	Coleman Cable, Inc.	Southwire Co.
12/20/2013	Responsys, Inc.	Oracle Corp.
12/17/2013	Valassis Communications, Inc.	Harland Clarke Holdings Corp.
12/15/2013	Solta Medical, Inc.	Valeant Pharmaceuticals International, Inc.
12/15/2013	NuPathe Inc.	Endo Health Solutions Inc.
11/25/2013	Harris Interactive Inc.	Nielsen Holdings N.V.
11/11/2013	ViroPharma Incorporated	Shire plc
11/7/2013	Santarus, Inc.	Salix Pharmaceuticals, Ltd.
11/5/2013	Mindspeed Technologies, Inc.	M/A-COM Technology Solutions Holdings, Inc.
10/21/2013	Symmetricom, Inc.	Microsemi Corporation
10/18/2013	Tellabs, Inc.	Marlin Equity Partners
9/28/2013	The Active Network, Inc.	Vista Equity Partners
9/23/2013	Official Payments Holdings, Inc.	ACI Worldwide, Inc.
9/19/2013	Verenium Corporation	BASF Corporation
9/16/2013	Boise, Inc.	Packaging Corporation of America
9/5/2013	Astex Pharmaceuticals, Inc.	Otsuka Pharmaceutical Co., Ltd.
9/5/2013	Kaydon Corporation	Atlas Management, Inc.
8/24/2013	Onyx Pharmaceuticals, Inc.	Amgen Inc.
8/15/2013	Volterra Semiconductor Corporation	Maxim Integrated Products, Inc.
8/14/2013	Steinway Musical Instruments, Inc.	Paulson & Co. Inc.

APPENDIX B Blackline of 2014 Amendments to DGCL Section 251(h)

(h) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation whose shares are listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger by such constituent corporation shall be necessary to authorize a merger if:

(1) The agreement of merger~~, which must be entered into on or after August 1, 2013,~~ expressly (i) permits or requires such merger to be effected under this subsection and (ii) provides that such merger ~~shall be governed by this subsection and~~ shall be effected as soon as practicable following the consummation of the offer referred to in paragraph (h)(2) of this section if such merger is effected under this subsection;

(2) A corporation consummates a tender or exchange offer for any and all of the outstanding stock of such constituent corporation on the terms provided in such agreement of merger that, absent this subsection, would be entitled to vote on the adoption or rejection of the agreement of merger; provided, however, that such offer may exclude stock of such constituent corporation that is owned at the commencement of such offer by: (i) such constituent corporation; (ii) the corporation making such offer; (iii) any person that owns, directly or indirectly, all of the outstanding stock of the corporation making such offer; or (iv) any direct or indirect wholly-owned subsidiary of any of the foregoing;

(3) Following the consummation of ~~such offer,~~ the offer referred to in paragraph (h)(2) of this section, the stock irrevocably accepted for purchase or exchange pursuant to such offer and received by the depository prior to expiration of such offer, plus the stock otherwise owned by the consummating corporation ~~owns~~ equals at least such percentage of the stock, and of each class or series thereof, of such constituent corporation that, absent this subsection, would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation;

~~(4) At the time such constituent corporation's board of directors approves the agreement of merger, no other party to such agreement is an "interested stockholder" (as defined in § 203(c) of this title) of such constituent corporation;~~

~~(5~~(4) The corporation consummating the offer ~~described~~ referred to in paragraph (h)(2) of this section merges with or into such constituent corporation pursuant to such agreement; and

(~~6~~5) ~~The~~ Each outstanding ~~shares~~ share of each class or series of stock of the constituent corporation ~~not to be canceled in the merger are~~ that is the subject of and not irrevocably accepted for purchase or exchange in the offer referred to in paragraph (h)(2) of this section is to be converted in such merger into, or into the right to receive, the same amount and kind of cash, property, rights or securities to be paid for shares of such class or series of stock of such constituent corporation ~~upon consummation of the offer referred to in paragraph (h)(2) of this section.~~ irrevocably accepted for purchase or exchange in such offer.

As used in this section only, the term (i) "consummates" (and with correlative meaning, "consummation" and "consummating") means irrevocably accepts for purchase or exchange stock tendered pursuant to a tender or exchange offer, (ii) "depository" means an agent, including a depository, appointed to facilitate consummation of the offer referred to in paragraph (h)(2) of this section, (iii) "person" means any individual, corporation, partnership, limited liability company, unincorporated association or other entity, and (iv) "received" (solely for purposes of paragraph (h)(3) of this section) means physical receipt of a stock certificate in the case of certificated shares and transfer into the depository's account, or an agent's message being received by the depository, in the case of uncertificated shares.

If an agreement of merger is adopted without the vote of stockholders of a corporation pursuant to this subsection, the secretary or assistant secretary of the surviving corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in this subsection (other than the condition listed in paragraph ~~(h)(5~~(h)(4) of this section) have been satisfied; provided that such certification on the agreement shall not be required if a certificate of merger is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

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