FROM THE CHAIR
By Nat Doliner

I am pleased to announce that Richard E. Climan (San Francisco and Palo Alto) has been appointed as Vice Chair of our Committee.

We had a wonderful stand-alone meeting of the Committee last October at the Carlton Hotel, in Washington, D.C., with perfect weather, excellent educational and informative meetings of our Task Forces and our Committee, and terrific social events. I would like to thank Greg Feis and Tom Parrott for their hard work in coordinating our stand-alone meeting, and their respective firms, Shaw, Pittman, Potts & Trowbridge and the Jefferson Law Firm, for helping to underwrite the cost of our reception.

Mauri Osheroff, Associate Director-Regulatory Affairs, of the Division of Corporate Finance, spoke to our Committee about the SEC’s proposed “aircraft carrier” regulations. We also had interactive discussions with Samuel Gunther, CPA, a member of the FASB Task Force on Business Combinations, about developments and trends in accounting for business combinations, and with Jonathan Legge and Patrick Cunningham, of F & H Marsh & McLennan, who spoke to us about insurance coverage for representations and warranties and insuring the tax effects of mergers and acquisitions.
Our newest subcommittee, the Committee Forums Subcommittee, will provide state-of-the-art education to our members at our Committee meetings. The members of the Subcommittee are: Keith Flaum, Chair, Palo Alto, CA; Ian Fagelson, London, England; Joel Greenberg, New York, NY; and Leigh Walton, Nashville, TN. I am very excited about this new Subcommittee. It is in keeping with the goals established by Jim Cheek, Chair of the Business Law Section, whose theme for his term is “Educating Business Lawyers for the 21st Century.” Slightly modified, our theme is “Educating Mergers and Acquisitions Attorneys for the 21st Century.” This subcommittee will help us achieve those objectives. Whenever possible, we will try to arrange CLE credit for our Committee meetings so that you can get an extra benefit from attending the meetings.

I am also excited about the efforts of our Membership Subcommittee, chaired by Alison Youngman, Toronto, Canada, to expand and enhance our already impressive membership. As we educate mergers and acquisitions lawyers for the 21st century, we recognize the need to offer opportunities within our Committee to younger lawyers and to more women and minorities who are involved in the mergers and acquisitions practice. We would also welcome the participation of more in-house counsel. The members of Alison’s Subcommittee include: Chuck Brownman, Houston, TX; David Gemunder, Cincinnati, OH; and Paula Rhodes, Tampa, FL.

Spring Meeting Details: The next meeting of the Committee will be at the Spring Meeting of the ABA Business Law Section in San Francisco. Our schedule is as follows:

**Editorial Working Group on Joint Venture Agreement Task Force**
Thursday, April 15, 2:00 – 5:00 p.m.

**Task Force on Public Companies**
Friday, April 16, 9:00 – 10:30 a.m.
Friday, April 16, 12:30 – 2:00 p.m.

**Task Force on Joint Venture Agreements**
Friday, April 16, 9:00 a.m. – 1:00 p.m.

**Committee Meeting**
Friday, April 16, 2:30 – 4:30 p.m.
(Committee Forum, Friday, April 16, 3:00 – 4:30 p.m.
Special guest speaker – George Boutros, Managing Director, Head of Technology M&A, Credit Suisse First Boston)

**Working Group on Ancillary Documents of Asset Acquisitions Task Force**
Saturday, April 17, 8:30 – 11:30 a.m.

**Editorial Working Group of Task Force On Asset Acquisitions**
Saturday, April 17, 9:00 a.m. – 5:00 p.m.

**Task Force on International Transactions**
Saturday, April 17, 10:30 a.m. – 1:00 p.m.

Joel Greenberg, New York, NY and Henry Lesser, Palo Alto, CA, are co-chairing our Committee’s program in San Francisco, entitled “Separation of Parent and Child: Issues When a Manager and a Financial Sponsor Buy His Division.” It will be presented on Friday, April 16, 1999 at 10:30 a.m.

Rick Climan and Keith Flaum are arranging our Committee’s dinner, which will be held at the superb Il Fornaio Restaurant (1265 Battery Street) on Thursday night, April 15, 1999. Stay tuned for further details. The ABA Annual Meeting this Summer will be in Atlanta, GA. The Business Law Section meetings will be held August 5 – 11, 1998. Tom Hyman is coordinating our Committee’s dinner at the Annual Meeting.

Our next stand-alone meeting of the Committee has been set for October 14 – 16, 1999 at the Princess Hotel and Resort in Scottsdale, Arizona. Please reserve these dates on your calendar.

The Third National Institute on Negotiating Business Acquisitions, held last November in New
Orleans, was a huge success. There were approximately 180 attendees at the Windsor Court Hotel. The Institute is co-sponsored by the Section of Business Law and the Section of Taxation, and our Committee takes a leading role in planning and presenting the Institute. Committee members who participated in the Institute are: Nelea A. Absher, Louisville, KY; R. Franklin Balotti, Wilmington, DE; David A. Bronner, Chicago, IL; Richard E. Climan, San Francisco and Palo Alto, CA; Joseph J. Connolly, Philadelphia, PA; Nathaniel L. Doliner, Tampa, FL; Diane H. Frankle, Palo Alto, CA; Vincent F. Garrity, Jr., Philadelphia, PA; Joel I. Greenberg, New York, NY; Robert T. Harper, Pittsburgh, PA; Curtis R. Hearn, New Orleans, LA; Darrel A. Rice, Dallas, TX; Robert E. Shields, Southfield, MI; and Leigh Walton, Nashville, TN.

Finally, I continue to be amazed at the dedication and hard work of our members. Several task forces held stand-alone meetings in January. Some members flew from coast to coast, others braved snowstorms, ice storms and other inclement weather, and a few got stranded by severe weather after making valiant efforts to travel to the meeting. The Editorial Group of the Asset Acquisition Task Force met in Tampa, on January 8 and 9, and the Public Companies Task Force met in New Orleans on January 23 and 24. These trips are definitely not “boondoggles” as the members of these task forces work extremely hard and are away from their practices and families over the weekend. Our task force members did, however, have a chance to socialize over a nice dinner after putting in a rigorous workday. It is the combination of hard work and camaraderie among our members that makes being a part of our Committee so special.

FEATURE ARTICLES

IMPLICATIONS OF RECENT AMENDMENTS TO SECTION 251 OF THE DELAWARE GENERAL CORPORATION LAW

By: Mark A. Morton
Michael A. Pittenger*

Last year, the Governor of the State of Delaware signed into law a bill, effective July 1, 1998, that amended the General Corporation Law of the State of Delaware1 (the “DGCL”), in order to effect a number of housekeeping measures and several substantive changes. In the months since those amendments became effective, two amendments to Section 251 of the DGCL, relating to board approval of merger agreements, have generated much debate among corporate practitioners (the “Section 251 Amendments”). The discussion that follows first summarizes the Section 251 Amendments and then addresses issues that counsel should consider when advising either a target2 or an acquiror whether to agree to include a provision authorized by the recent amendments in a proposed merger agreement.

A. Section 251 Amendments

The Section 251 Amendments resulted in two specific changes. First, Section 251(b) was

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1 8 Del. C. §101 et seq.
amended to require that the board of directors adopt a resolution approving the merger agreement and declaring the merger agreement to be "advisable." Before the amendment, Section 251 required a board of directors to “adopt” a resolution approving a proposed merger agreement and to “submit[ ]” the merger agreement to the stockholders for their approval at an annual or special meeting. Section 251, however, did not expressly require that the board “recommend” or “declare advisable” the proposed merger.3 By contrast, Section 242 of the DGCL, which governs amendments to certificates of incorporation, has long required that a board of directors adopt a resolution setting forth a proposed amendment and “declaring its advisability.”4

The official legislative synopsis to the amendment to Section 251(b) provides that:

The amendment to subsection (b) of Section 251 requiring a determination by the board of directors that a merger agreement is advisable conforms the board approval requirement in that subsection to the requirement in subsection (b)(1) of Section 242 that the board of directors declare a charter amendment advisable prior to submitting it to stockholders.5

Second, the Section 251 Amendments added the following sentence to subsection(c):

The terms of the [merger] agreement may require that the agreement be submitted to the stockholders whether or not the board of directors determines at any time subsequent to declaring its advisability that the agreement is no longer advisable and recommends that the stockholders reject it.6

According to the official legislative synopsis to the Section 251(c) amendment:

... a merger agreement may require that it be submitted to the stockholders even if the board, subsequent to its initial approval thereof, determines that the agreement is no longer advisable and recommends that the stockholders reject it. Compare Smith v. Van Gorkom, 488 A.2d 858, 887-88 (Del. Supr. 1985). The amendments are not intended to address the question whether such submission requirement is appropriate in any particular set of factual circumstances.7

B. Historical Background

In many respects, the impetus for the Section 251 Amendments may be traced to the Delaware Supreme Court's decision more than a decade earlier in Smith v. Van Gorkom.8 The Van

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3 Solely as a matter of convenience, we have used the terms “target” and “acquiror” throughout this article. Our use of such terminology, however, is not intended to suggest that the newly-enacted provisions of Section 251 are applicable only in the context of transactions involving a target and acquiror. To the contrary, we recognize that under certain circumstances, such as a strategic merger, the merger may not have a true “acquiror” and, in light of that fact, the parties may agree to include a Section 251(c) provision in the merger agreement pursuant to which both parties agree to present the merger agreement to their stockholders.

4 Notwithstanding the silence of Section 251 on this point, most corporate practitioners routinely advised their clients to have their boards of directors approve proposed merger agreements and recommend them to the stockholders for their adoption. Moreover, the Delaware Courts have suggested on several occasions that a board of directors is charged with the responsibility of recommending to stockholders approval of a proposed merger agreement. See, e.g., Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985).

5 Ch. 39, L. ’98 Synopsis of Section 251.

6 Conforming changes also were made to Sections 252, 254, 257, 263 and 264 of the DGCL, each of which addresses a different form of merger.

7 Ch. 339, L. ’98 Synopsis of Section 251.

The decision is, of course, best known for the Court's holding that the directors of Trans Union Corporation were personally liable for failing to exercise due care in considering and approving an arm's length cash-out merger. However, the Court’s decision also includes an extended discussion concerning a board’s ability to withdraw its recommendation of a proposed merger and the consequences of such a decision:

The [target] board could not remain committed to the Pritzker merger and yet recommend that its stockholders vote it down; nor could it take a neutral position and delegate to the stockholders the unadvised decision as to whether to accept or reject the merger. Under 251(b), the board had but two options: (1) to proceed with the merger and the stockholder meeting, with the Board’s recommendation of approval; or (2) to rescind its agreement with Pritzker, withdraw its approval of the merger, and notify its stockholders that the proposed shareholder meeting was cancelled... But the second course of action would have clearly involved a substantial risk – that the Board would be faced with a suit by Pritzker for breach of contract... [Under the merger agreement], the Board's only ground for release from its agreement with Pritzker was its entry into a more favorable definitive agreement to sell the Company to a third party.9

Several important principles are suggested by the Court’s decision in Van Gorkom. First, notwithstanding the absence of a recommendation requirement in Section 251, the Court clearly suggested that Section 251 required the board to recommend approval of the proposed merger agreement. Second, Van Gorkom suggests that, without the board’s recommendation of a proposed merger, the stockholders’ meeting must be cancelled because the stockholders are not entitled to consider the proposed merger. Third, the decision suggests that if a board withdraws its approval of a proposed merger agreement, then the board also must rescind the agreement and, unless it has preserved an express right to terminate the agreement under such circumstances, the board may be faced with a possible suit for breach of contract. Fourth, the Court indicated that the target board, if it wants to avoid unnecessary exposure to claims relating to fiduciary and/or contractual breaches, should negotiate for specific “releases” or “outs” that provide the board with the flexibility to withdraw its recommendation and terminate a merger agreement under certain limited circumstances.

After Van Gorkom, practitioners debated its ramifications. On the one hand, some practitioners argued that the members of a board of directors had a fiduciary right and obligation, at any point prior to stockholder approval, to change their recommendation of a merger agreement if it was no longer in the best interests of the stockholders (even though Van Gorkom suggested that the board’s revocation would expose it to a breach of contract claim absent an appropriate contractual reservation). On the other hand, other practitioners read Van Gorkom to mean that a board’s duties, including its obligation to recommend a merger proposal, may be completely satisfied at the time of the board’s initial approval of the transaction, and, unless the merger agreement otherwise provides, the board does not have the right (or the duty) to rescind its recommendation at a later date. Under either reading of Van Gorkom, however, the target's board of directors has a strong incentive to negotiate for appropriate “outs” that enable the board to consider and respond to a subsequent, superior offer. Without such protections, a target board may risk finding itself in the unenviable position of either (i) continuing to “recommend”

9 Id. at 888.
an initial merger proposal, even though the board believes the subsequent, superior offer to be in the best interests of stockholders, or (ii) withdrawing its recommendation, canceling the stockholders’ meeting and rescinding the initial merger agreement. In the former case, the target board’s decision would raise, at best, troubling disclosure issues and, at worst, may give rise to breach of fiduciary duty claims (based upon the board’s failure to negotiate for appropriate contractual flexibility in the merger agreement). In the latter case, the target board’s decision would risk a breach of contract claim seeking either specific performance of the merger agreement or damages.

Recognizing that a board may be faced with circumstances in which it may want to rescind its initial recommendation without facing a claim for specific performance or contractual damages, counsel for targets have, over the years, continued to negotiate for the inclusion of specific “fiduciary outs” in merger agreements. Typically, such fiduciary outs provide a target board with the right to respond to certain types of unsolicited offers, withdraw its recommendation in favor of subsequent deals satisfying specific criteria and terminate the merger agreement under certain limited circumstances.

More recently, however, some corporate practitioners have argued that, so long as the board of directors has complied with its fiduciary duties when initially recommending a merger proposal, then the board does not have the obligation to reserve the right to later withdraw its recommendation. Under this theory, there is no continuing duty to re-evaluate a merger proposal in view of changed circumstances occurring prior to the shareholder vote. Rather, such practitioners maintain, if a target board wants the right to withdraw its recommendation and consider subsequent offers, then the board must negotiate to preserve that right as a matter of contract.

The Section 251 Amendments would appear to have resolved several of the issues raised (but not resolved) by Van Gorkom. First, as revised, Section 251(b) has clarified that the board of directors must declare the merger agreement to be “advisable” prior to submitting it to the stockholders. Second, if the target and acquiror agree to include a Section 251(c) provision in the merger agreement, then Section 251(c) effectively overrules the suggestion in Van Gorkom that stockholders may not consider a merger proposal without the board’s recommendation in place.

The availability of Section 251(c) also addresses some of the concerns raised by corporate practitioners. On the one hand, for those practitioners who expressed the belief that the target board had a continuing obligation to consider the advisability of a proposed merger transaction until the stockholders have approved the transaction, the inclusion of a Section 251(c) provision now permits the target to avoid the possibility of contractual damages arising from a board’s withdrawal of its recommendation. On the other hand, for those practitioners who have argued that a target board that satisfied its fiduciary duties when initially recommending a merger agreement has no fiduciary duty to reserve the right to recommend a later, superior proposal, the use of a Section 251(c) provision merely provides acquirors with a means by which they will be assured of presenting a binding agreement to the target’s stockholders for their consideration.

Not surprisingly, however, the Section 251 Amendments also have raised a number of new questions. When a target and an acquiror agree to include a Section 251(c) provision in a merger agreement, it is now unclear (i) whether a board is required by its fiduciary duties to continue to evaluate the advisability of a merger proposal until such time as the stockholders have acted on such proposal, (ii) whether the fiduciary duties of the board of directors ever will require the board to withdraw its recommendation of a merger proposal, (iii) what measures, if any, a board
should (or must) take after it has withdrawn its recommendation in order to prevent such a merger proposal from being approved by stockholders, and (iv) whether, after a target board has withdrawn its recommendation, an acquiror may nonetheless require a target to undertake measures in support of the merger proposal (for example, abiding by its covenant to solicit proxies in favor of the merger).

C. Considerations When Negotiating A Section 251 (c) Provision

When the Section 251 Amendments became effective on July 1, 1998, most practitioners expected targets to resist vigorously the efforts of acquirors to include Section 251(c) provisions in merger agreements. To date, it remains unclear what percentage of merger agreements contain Section 251(c) provisions. Anecdotal evidence suggests, however, that acquirors have been relatively successful in their efforts to include Section 251(c) provisions in merger agreements.

In most cases, the inclusion of a Section 251(c) provision in a merger agreement will affect the rights and duties of both the target and the acquiror. For that reason, the boards of both the target and the acquiror should carefully weigh whether such a provision is appropriate in the context of the proposed merger agreement. In practice, however, it is likely that Section 251(c) provisions ordinarily will be regarded as pro-acquiror. Therefore, a target board should exercise particular caution when considering whether and under what circumstances to agree to include a Section 251(c) provision. In the discussion that follows, we have identified a number of the issues to be considered by a target and an acquiror in negotiations concerning a proposed Section 251(c) provision.

1. Continuing Duty to Recommend?

Interestingly, a number of Delaware corporate practitioners have suggested that Section 251(c), when used, may require a target board to continue to consider whether a merger agreement remains advisable until such time as the stockholders have acted on the merger agreement. In reaching this conclusion, those practitioners have observed that, if the board of directors has the right to withdraw its recommendation (whether or not it is obligated to proceed with a meeting of stockholders), then presumably the board’s decision to withdraw its recommendation or to continue to recommend the merger must be an informed one. In order to render an informed judgment, however, the board of directors arguably would have to monitor and assess the advisability of the proposed transaction up to the time of the stockholder vote. Moreover, if the target board’s duty to recommend the proposed merger agreement could be satisfied merely by its initial recommendation, with no further duty to evaluate the advisability of the transaction (as some practitioners have suggested), then arguably the reference in Section 251(c) to the board’s ability to determine “that the agreement is no longer advisable and should be: [recommend] that the stockholders reject it” could be viewed as meaningless. Since a Delaware court will endeavor to find meaning in all of the terms set forth in a statutory provision, a Delaware Court could conclude that, when the parties have agreed to be bound by Section 251(c), the target board has a continuous (not merely an initial) obligation to consider its recommendation of a proposed merger agreement. One would expect, however, that such a duty would arise only if a subsequent change in

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10 Section 251 (c) provides that a merger agreement may “require that the agreement be submitted to the stockholders whether or not the board of directors determines at any time subsequent to declaring advisability that the agreement is no longer advisable and recommends that the stockholders reject it.” (italics added)

circumstances called into question the board’s initial decision to recommend the transaction.

2. Impact of Standstill Agreements

Before beginning serious discussions concerning a proposed acquisition, many targets will require a potential acquiror to enter into a standstill agreement. Typically, such agreements require, among other things, that the acquiror may not obtain direct or beneficial ownership of any additional shares of the target without the approval of the target board. However, if a standstill agreement permits an acquiror to enter into voting agreements with other stockholders (and thus lock up the vote of a majority or a substantial portion of the target’s outstanding voting stock), then the existence of a Section 251(c) provision in the merger agreement may enable the acquiror to take steps to guarantee the approval of the proposed merger agreement. For example, if the acquiror is able to enter into voting agreements with the holders of a majority of target’s outstanding shares pursuant to which they agree to vote their shares in favor of the proposed merger agreement, then the target board’s ability to withdraw its recommendation may be rendered meaningless. For that reason, in some circumstances, it may be important for a target board to negotiate for a more traditional termination right that preserves its ability to pursue subsequent proposals offering higher values to stockholders. Indeed, in certain circumstances (for example, a change of control), one could argue that a decision by a board to agree to a Section 251(c) provision – where the acquiror then would have the unilateral ability to lock up the vote - amounts to a breach of the board’s fiduciary duties.

3. Impact on Standard Merger Agreement Covenants

Where a target has agreed to include a Section 251(c) provision in a proposed merger agreement, the target’s subsequent decision to rescind its recommendation may present a myriad of potential problems for the target unless its counsel has successfully negotiated for certain limitations or carve outs to covenants that might later impose obligations on the target board that are inconsistent with its decision to withdraw its recommendation of the transaction. For example, targets frequently covenant to solicit proxies in favor of a proposed merger agreement. However, once a target board has withdrawn its recommendation of a merger agreement, it would be placed in a rather precarious position if it were at the same time contractually obligated to employ the target’s money and resources to solicit proxies in favor of that transaction. Indeed, under such circumstances, one could argue the target board should have a duty to solicit proxies against the proposed merger agreement. Many of the merger agreements that have been negotiated in the wake of the Section 251 Amendments, however, have not expressly conditioned the target board’s contractual obligation to solicit proxies in favor of the proposed transaction on the board’s continuing recommendation of the transaction.

Similarly, although Section 251(c) provides a mechanism for “requir[ing] that the [merger] agreement be submitted to the stockholders,” Section 251 does not impose any special requirements with respect to the manner in which or the time at which the stockholders’ meeting may or should be held. As a result, an acquiror may demand that a merger agreement include a covenant requiring the target to hold the stockholders’ meeting on the earliest date available. Conceivably, the acquiror also might request a covenant from the target that, at the request of the acquiror’s board, the target board will postpone the stockholders’ meeting for a specified period of time. From the acquiror’s perspective, the former request permits the acquiror to minimize the period during which the target will have an opportunity to rescind its recommendation, while the latter request would enable the acquiror additional time, if necessary, to solicit proxies in favor of the proposed merger
if the target board were to withdraw its recommendation. By contrast, the target in most cases will want to negotiate for a covenant that grants the target board as much autonomy as possible with respect to the timing of the stockholders’ meeting. With such autonomy, the target board will be in a position to schedule the stockholders’ meeting for a date when it believes the acquiror’s proposal is likely to be approved (if the board’s recommendation remains in place), or rejected (if the board has withdrawn its recommendation). In addition to negotiating for flexibility with respect to those covenants that otherwise would require a target board to engage in conduct that might favor a merger proposal even after it has withdrawn its approval recommendation, a target board also should consider what limitations, if any, it will accept on its ability to support a different transaction it thereafter determines to withdraw its initial recommendation. Frequently, an acquiror will seek to require a target board to agree that it will not recommend any other transaction, amend its poison pill (except to carve out the initial bidder), or approve any other person or transaction for purposes of Section 203 of the DGCL, the Delaware statute governing business combinations with interested stockholders. In light of the preclusive nature of such covenants, in some circumstances (such as those involving a proposed sale or change of control), the target board’s success or failure in negotiating “recommendation outs” to such covenants may be critical. Unless the target board has negotiated appropriate “recommendation outs” for such covenants (and perhaps others), a new bidder’s only choice may be to make a bid, wait until the stockholders meeting, and hope that the stockholders vote to reject the initial transaction.

Of course, even if a target board has withdrawn its recommendation of a proposed merger agreement, a new bidder may be unwilling to await the outcome of the stockholders’ meeting. It is worth noting, in this regard, that the Securities and Exchange Commission (“SEC”) review period for mergers now typically takes nearly two months (plus additional time for the parties to respond to the SEC’s comments), after which period the target board usually needs additional time to notice and hold its stockholders’ meeting. As a result, unless the target has negotiated appropriate outs to the merger agreement, it is conceivable that a new bidder may have to wait three months or more before the target board could even consider recommending the new bid.

In light of such scenarios, target boards will no doubt seek to negotiate for limited “recommendation outs” that would permit, among other things, the target, in the event the board rescinds its recommendation (i) to amend its poison pill to permit acquisitions by a later bidder, (ii) to approve, for purposes of Section 203 of the DGCL, either a business combination or the transaction by which a later bidder would become an “interested stockholder,” and (iii) to recommend a new transaction. Arguably, the failure to include such “recommendation outs” may unfairly deter other interested bidders.

4. Recommendation Outs

In light of the potential problems recited above, a prudent target board and its counsel should consider negotiating for “recommendation outs” to the aforementioned covenants, among others. In the event that the target board withdraws its recommendation, the target’s obligations under such covenants would be modified or omitted. Thus, by way of example, the target and acquiror could qualify the target’s covenant to solicit proxies in favor of the merger agreement by

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12 The covenants discussed above by the authors are not intended to represent an exhaustive list of every covenant that might merit a “recommendation out.” To the contrary, depending upon the facts and circumstances of the particular case, it may (or may not) be appropriate to include such an “out” in some of the aforementioned covenants or in any number of other covenants.
providing that, if the target board shall have withdrawn its recommendation of the proposal, the target shall have the discretion to solicit proxies for or against the proposed merger. Similarly, the target board should consider requesting comparable “recommendation outs” for its covenants with respect to its poison pill rights plan and Section 203 approval.

From the acquiror’s perspective, of course, such “recommendation outs” will be seen as undermining the stability of its proposed transaction and, therefore, will be resisted. To the extent that the target’s counsel is successful in convincing the acquiror’s counsel that the target board’s fiduciary duties require such “outs,” the acquiror may be prepared to accommodate the target’s concerns. In many situations, however, it is more likely that the acquiror would offer to condition the target board’s withdrawal of its recommendation (and, by extension, the “recommendation outs” to each of the aforementioned covenants) on the existence of a “superior proposal.”

Targets may be expected to raise two objections to a “superior proposal out” provision. First, as a threshold matter, a target may argue, for the reasons discussed above, that it is improper to impose any limitations upon the target board’s continuing obligation to consider whether to withdraw its recommendation of the proposed merger agreement. Second, the target may wish to have the ability to withdraw its recommendation not only in response to superior offers, but also in other circumstances. For example, the target may conclude that it is important for the board to have the ability to rescind its recommendation if (i) unforeseeable market events occur, (ii) the target experiences an unforeseen windfall, or (iii) the acquiror experiences an unforeseen shortfall. Whether, and the extent to which, a target desires to maintain such flexibility will, of course, depend on the particular circumstances.

5. Disclosure Issues

If Section 251(c) is read as requiring a board to continue to consider the advisability of a proposed merger agreement until the stockholders have approved (or rejected) the proposal, then the target board may face difficult disclosure issues if it ultimately decides to withdraw its recommendation. Specifically, if the target was unsuccessful in negotiating appropriate “recommendation outs,” then the board may have a contractual obligation to undertake actions that are inconsistent with its decision to withdraw its recommendation. Conversely, if the target fully discloses the basis for its decision to withdraw its recommendation, the board may risk a suit from the acquiror for its failure to use its best efforts to solicit proxies in favor of the merger proposal (assuming the merger agreement does not contain a “recommendation out” to such a best efforts covenant). Obviously, the tensions created by what are arguably conflicting obligations may in many circumstances complicate the target’s effort to prepare and disseminate accurate proxy materials.

Even if the target board continues to recommend a proposed merger agreement, the nature of the board’s disclosure obligations may become quite muddled. For example, if the merger agreement provides for a fixed exchange ratio, will dramatic market changes that depress (perhaps temporarily) the acquiror’s stock price require the target board to reconsider its recommendation? If so, what information should the target board rely upon in reaching its new decision? Should the target board request a bring down of its investment banker’s fairness opinion? Assuming the target board concluded that the proposed merger remains “advisable,” does the board have to amend its proxy materials to disclose that its recommendation has not changed? These questions, and many others concerning Section 251(c), await the consideration of the Delaware courts.
6. Aggregate Effect

Finally, before agreeing to include a Section 251(c) provision in a proposed merger agreement, both the target and acquiror should consider the aggregate effect of all of the proposed “lock-up” provisions, including the Section 251(c) provision. As we noted above, a Section 251(c) provision has the potential to have a preclusive effect on a bidding process. As a result, at least in the sale or change of control context, a target’s counsel is likely to argue that the target’s agreement to include such a provision would represent a significant concession and, therefore, that it should be met with comparable concessions from the acquiror. Ultimately, however, since the target and acquiror both share the same goal – to structure an enforceable transaction that rewards the target’s stockholders with a fair price – and since the Delaware courts have not yet considered the impact of a Section 251(c) provision, targets and acquirors alike would be wise to use caution as the guiding principle when negotiating a proposed Section 251(c) provision.

C. Conclusion

The recent Section 251 Amendments may well have altered the legal landscape of Delaware corporate law more dramatically than many corporate practitioners expected or now appreciate. Arguably, the inclusion of a Section 251(c) provision in a merger agreement imposes on the target board a fiduciary obligation to continue to consider whether to rescind its recommendation of the proposed merger agreement until the stockholders have acted on the proposal. In addition, when a Section 251(c) provision is used, counsel for both target and acquiror should consider the appropriateness of including many of the covenants typically contained in merger agreements, or at least the extent to which such typical covenants should be revised to include “recommendation out” provisions.

ANTI-TRUST CONSIDERATIONS: GETTING THE DEAL CLEARED IN EUROPE

By: Edward Miller
Warner Cranston, London

Key ant-trust pointers for US transaction lawyers involved in European deals

Long Arm Reach

Review of the jurisdiction of European anti-trust authorities is rarely omitted from the transaction lawyer’s checklist when his US client is acquiring a European target. Watch out, though for the deals where two US parents both have subsidiaries in Europe, or maybe even where target and bidder both sell into Europe without having any fixed presence at all across the Pond. Your deal may still be caught!

One Stop Shop?

Contrary to popular belief, Europe is not a one stop anti-trust shop. Despite recent extensions to the exclusive anti-trust jurisdiction of the European Commission, you will still often find yourself obliged to shop for clearances from a number of different anti-trust boutiques at State level - even in relatively large deals. Therefore, you need to make sure all the relevant anti-trust issues are covered in the contract when you stipulate the conditions to closing.

Very large transactions usually fall under the exclusive jurisdiction of the European Commission. These transactions are where the combined worldwide turnover of bidder and target exceed ECU 5,000 million (roughly about five billion dollars), and each of them achieves at least ECU 250 million of that in the Community.
is a carve-out from the Commission’s jurisdiction where bidder and target each achieve more than two thirds of their EU turnover in one and the same EU State1.

**Unholy Trinity**

In the face of complaints from frustrated bidders obliged to make a multiplicity of filings throughout Europe in transactions that, although below the thresholds mentioned above, were nevertheless sizeable, the Commission resolved to increase its jurisdiction by reducing applicable thresholds. This initiative met vigorous resistance from several member States whose objective was to guard jealously jurisdiction at State level in the face of a perceived federalist threat.

The result is a rather unhappy horse-traded compromise that reduces the jurisdictional threshold to ECU 2,500 million in deals involving at least three EU States. However, the applicability of this reduced threshold is subject to a series of Machiavellian pre-conditions. Take the example of a simple deal with one bidder and one target. Here the reduced threshold will apply only if all of the following are satisfied:

- combined turnover of bidder and target is more than ECU 100 million in each of at least three EU States
- in each of those three States, bidder or target alone achieves more than ECU 25 million
- bidder and target each achieve more than ECU 100 million community wide

The two-thirds rule carve-out mentioned above also applies. For those who wish to study the details more closely, the Competition Directorate of the Commission has published an unofficial consolidated text of the relevant legislation - (EU Merger Regulation - Council Regulation No 4064/89 as amended by Council Regulation No. 1310/97) on its website: (http://europa.eu.int/en/com/dg04/lawmerg/en/regconso.htm).

**Getting Past the Commission**

Procedure under the EU Merger Regulation bears some similarities - and some differences - to that applicable under HSR. Notification of qualifying deals is obligatory and there is an initial one-month examination period during which the deal generally may not be consummated. Unlike HSR, however, the initial notification must set out a comprehensive market analysis. Time runs from delivery of a complete notification - and the Commission has in some cases stopped the clock on grounds of incompleteness. If, by the end of the initial period, the Commission does not clear the deal or decide that the deal is outside its jurisdiction, it will then open a four-month Stage Two Proceeding.

**Multiple Filings**

Given the relatively tightly defined exclusive jurisdiction of the Commission, it is evident that many deals will fall outside it. Although the general principle is that where the Commission does have jurisdiction, that jurisdiction is exclusive in the EU, deals outside this jurisdiction may require several separate clearances in several States. All this in addition perhaps to an HSR filing back home.

Note that the Commission, the DOJ, the FTC and the various European State anti-trust authorities generally have the right to share information about deals. What is more, this sharing regularly occurs in practice. You could get in a bind when, for example, the arguments on

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1 The member states of the Community - now more fashionably known as the European Union or EU - are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the UK. EU regulation more or less applies also to Iceland, Liechtenstein and Norway via the European Economic Area treaty. Others, including Cyprus, Turkey and some Eastern Europeans, wait in the wings.
The Spice of Life

This article is not the place to set out a complete list of the variety of different thresholds and criteria applied by the authorities of the different EU States. Here, however, are a few of the more important considerations to bear in mind.

In some states, notably the UK, notification is not compulsory. This situation often gives rise to some interesting tactical considerations. Where notification is voluntary, anti-trust authorities usually reserve the right to investigate on their own initiative and have a window (in the UK, four months post closing) to undo the transaction. After careful analysis, a bidder might decide to take the risk and close, particularly where - for example in an auction sale - not insisting on an anti-trust condition to close might sway the seller in favor of your client’s bid.

Turnover, assets and market share are all relevant to varying extents in different jurisdictions. The market will need to be defined geographically as well as by product, and it is not a given that the accepted geographical market will always be the relevant State; it could be the world, the Community, or conversely a single town or region of one State. Whilst in Germany and France, turnover and market share are important, in the UK it is assets (interestingly, gross, not net value) and market share. In Ireland, it is assets and turnover. In France and Italy, national turnover is relevant, whereas in Austria, Belgium, Germany, Ireland and the Netherlands, worldwide figures are more important.

Early Bird

Review of applicable thresholds at European or State level (let alone the compilation of an required filings themselves) requires a significant amount of information gathering. Although many industries publish helpful market surveys, most of the key initial information required will be reliably obtainable only through your client. Even sophisticated clients regularly involved in M&A transactions can take time to produce all the information required. Pre-announcement confidentiality requirements often make matters worse at early stages of a transaction by effectively preventing senior managers from engaging the services of junior staff. Transatlantic time differences don’t help either. So, please be warned. If you don’t want unsatisfied anti-trust conditions to delay closing your cross-border deals - start your anti-trust review early.

Asset Acquisitions Task Force

As the Asset Acquisition Task Force continues to focus on completion of its Model Asset Acquisition Agreement project, the ABA Publications Committee continues to be excited about publishing, publicizing and selling the final product. Finishing the Model Asset Purchase Agreement has been delegated primarily to three groups: (1) the Editorial Group, chaired by Byron Egan, which is working to complete the text and commentary of the Agreement; (2) the Ancillary Documents Group, chaired by Larry Tafe, which is preparing the exhibits and other ancillary documents to the Agreement; and (3) the International Task Force, co-chaired by John Leopold and Guy Weijer, which is preparing an annex to the Agreement on international aspects of asset acquisitions. Other annexes to the Agreement will relate tax issues in asset acquisitions, successor liability and special issues involving acquisition of divisions.
Each of the three Groups worked on its assignments at the Committee’s October stand alone meeting in Washington and separately thereafter. The Editorial Group had a stand alone meeting in Tampa on January 9 and 10 which was notable both for the amount accomplished and the impact of snowstorms (it did not snow in Tampa, but participants from the East were challenged by snow-related closed airports and canceled flights).

A revised draft of the Model Asset Purchase Agreement will be distributed to those Task Force members registered for the ABA’s Spring Meeting in San Francisco in April. The commentary to the Agreement still needs to be supplemented and updated and, to that end, request is made that recipients of the draft focus particularly on the commentary and provide updating information to Byron Egan and Jon Hirschoff. For this purpose, internal firm memoranda, copies of cases and markups of the draft are all welcome.

Byron F. Egan and H. Lawrence Tafe, III, Co-Chairs

International Transactions Task Force

The International Transactions Task Force met on October 17, 1998 in Washington. The first project of the Task Force has now been completed. The work product is titled “Asset Acquisitions: 33 Foreign Lawyers’ Summaries of their Countries’ Law”. The product consists of an overview of big picture issues in doing an asset transaction in different jurisdictions around the world. It is in the form of responses to a model questionnaire and covers 33 countries. Local counsel in each of the relevant jurisdictions prepared the responses on the basis of the questionnaire provided to them.

As one can appreciate, this project has been a huge endeavor that has involved the contribution of many different people. We want to express our deep appreciation and thanks to all those who participated and contributed: the Task Force members, local counsel and, most of all, the Editorial Working Group of our Task Force that has worked so hard over the last few months to finalize the product. They have done a truly remarkable job in putting this mass of material together. The Editorial Working Group was chaired by Howard Barnhorst, and its other members were Wilson Chu, Jude Leblanc, Don McKenzie, Darrel Rice and John Swan.

Now that the Task Force seeks to justify its continued existence, we have undertaken a new project, consisting of creating of international overview for a stock deal. We had our first meeting in Washington, and we reviewed a draft of the stock purchase questionnaire that had been prepared by a subgroup of our Task Force.

Given that this project is just starting, it is a perfect time for any Committee member who has an interest in joining our Task Force to do so. We are actively seeking new members to assist us in this project. We also have other projects on the planning table, namely, international appendices to the joint venture agreement and the ancillary agreements.

On the program front, we have a program scheduled for Atlanta in 1999 focusing on South America, and a program for New York/London in 2000 with a transactional focus, the intent being to do a program in both New York and London.

Guy-Martial A.X. Weijer and John W. Leopold, Co-Chairs

Joint Venture Agreements Task Force

We will circulate a revised agreement for discussion at the San Francisco meeting, and we are contemplating assigning review issues
alphabetically to focus the discussion. We are also beginning to focus on the commentary. The process of developing the commentary is expected to refine further the document itself -- and be the source of lively discussion.

Tom Hyman, Co-Chair

Acquisitions of Public Companies Task Force

The Task Force met on October 15, 1998 at the Sheraton Carlton Hotel in Washington, DC.

Ms. Frankle noted that the ABA would hold a satellite program repeating the Task Force’s Program on Walk Rights and Deal Lockups on January 28, 1999, at 2:00 p.m. Joel Greenberg, Rick Climan and Diane Frankle are panelists and the program length is scheduled for one and one half-hours. The Task Force discussed the New Orleans Stand Alone Task Force Meeting on January 23, 1999. The following agenda of the January 1999 New Orleans meeting was agreed upon:

- Commentary of No Shop and Termination
- Revised Additional Agreements
- Representations and Warranties

The Task Force reviewed the various drafting projects. All Task Force members acknowledged that practice commitments had prevented completion of assigned tasks. Each drafting group chose a project leader to coordinate efforts and act as chief nag and liaison to the Co-chairs. They are as follows:

Termination and No Shop: Darrel Rice
Additional Covenants: Peter Koerber
Conditions: Diane Frankle
Representations & Warranties: Joel Greenberg
Issues List: Henry Lesser
Due Diligence Checklist: Bucky Vaughan

The members also discussed a letter from Drew Fuller requesting guidance on the draft of a due diligence checklist and Diane Frankle agreed to communicate back to the drafting team. Task Force members agreed to get sample due diligence checklists to Drew Fuller and Neil Brockmeyer, and issues lists or time and responsibilities lists to Henry Lesser for the issues list drafting team as soon as possible.

Diane Frankle asked the members if any were seeing practice evolve regarding “no shops” in light of John Johnston’s insightful articles on “fiduciary outs”. The members noted that practice had not changed as yet and that the standard formulation for buyers first draft remained that the Board would need to have determined in good faith based on advice of [or after consultation with] outside legal counsel that [the desired action] was required by the Board’s fiduciary duties to the stockholders. The members agreed that John Johnston’s issue and possible alternative formulations [e.g., “substantial risk not in compliance with” or “inconsistent with”] to be proposed by targets should be included in commentary. Rick Climan led a discussion on negotiation of capped options. Rick also led a discussion concerning the value of adding “knowledge” qualifiers to representations when the representations were to be true only at closing and only willful breaches resulted in contract liability.

Diane Holt Frankle, Co-Chair

SUBCOMMITTEE REPORTS

Committee Forums

George Boutros is the Managing Director, Head of Global Technology Mergers & Acquisitions, of Credit Suisse/First Boston. Mr. Boutros, who has played a major role in some of the most prominent M&A transactions in the technology sector, will discuss emerging trends in
that sector. He will focus on the structural and strategic considerations unique to technology deals.

Keith Flaum, Chair

**Brown Bag**


A second program was held in September, 1997, in Pittsburgh. Committee members, Thomas M. Thompson and Robert T. Harper presented the program. The program materials from the first program were used and are available for future programs. The Committee would like to sponsor additional Brown Bag Programs. If any Committee members are interested, please contact me at (616) 383-5813, or by e-mail, evbrown@millercanfield.com.

Eric V. Brown, Jr., Chair

The Negotiated Acquisitions Committee Newsletter is published approximately three times a year by the American Bar Association, Section of Business Law, Negotiated Acquisitions Committee. The views expressed in the Negotiated Acquisitions Committee Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Negotiated Acquisitions Committee. If you wish to comment on the contents, please write to the Negotiated Acquisitions Committee, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois, 60611.