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PREPARING THE “BACKGROUND OF THE MERGER” SECTION IN MERGER PROXY STATEMENT

The “background of the merger” section in the proxy is an important section that is scrutinized by both the plaintiffs’ bar and the SEC. In this article, the authors discuss the (1) legal framework governing the disclosure of the “background of the merger,” (2) the process of preparing the “background of the merger” section, and (3) common areas of focus for both the Delaware courts and the SEC. The legal framework governing the disclosure of the “background of the merger” section includes the federal securities law and state law. The preparation of the “background of the merger” section should follow a few recommended protocols to ensure accuracy and completeness. The common topics scrutinized by Delaware courts and the SEC include non-disclosure agreements, material interactions between the parties, and potential conflicts of interest. The article concludes by providing a number of takeaways for practitioners.

By James Hu, Andrew Hammond, and Melissa Curvino *

In a public company merger involving a target company incorporated in Delaware, federal securities law and Delaware law require the disclosure of certain material events leading up to the merger agreement. The disclosure is commonly known as “the background of the merger” section in a merger proxy statement.¹ The “background of the merger” section is an area that is scrutinized by both the SEC and the plaintiffs’ bar in

Delaware.² This article explores the best practices in preparing the “background of the merger” section with a view to position parties to both satisfy SEC requirements and defend against potential plaintiff lawsuits.

LEGAL FRAMEWORK

SEC Requirements

When security holders of the acquiring company and/or the target company are voting to approve a

¹ A similar section will appear in Schedule TO and Schedule 14D-9 in a tender offer or Schedule 13e-3 of a “going private” transaction and in a Registration Statement on Form S-4 or F-4 in a transaction where the consideration includes the issuance of securities. However, for purposes of simplifying the discussion, this article will focus on disclosure requirements in the merger proxy statement in an all-cash acquisition.

² The SEC often elects not to review a merger proxy statement for an all-cash merger. The comment letters cited in this article were largely in relation to registration statements on Form S-4 and F-4, which the authors believe are nonetheless helpful guidance when it comes to a merger proxy statement for an all-cash merger.

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