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Client Alert

M&A Transactions Under Utah's New "Fairness Hearing" Statute

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Utah's recently enacted "fairness hearing" statute dramatically simplifies issuing securities in connection with M&A transactions, and will save Utah companies substantial amounts of time and money, while increasing the available deal structure alternatives for proposed M&A transactions.

The Problem

In M&A transactions where securities are being issued by the acquirer as part or all of the consideration, those securities must either qualify for a registration exemption under federal securities laws or be registered with the Securities and Exchange Commission (the "SEC"). In addition, those securities must also qualify for a registration exemption under all applicable state securities laws, or be registered with the securities regulators of each state in which the target has shareholders. The problem is that in many M&A transactions the securities being issued do not qualify for a federal registration exemption, necessitating the filing of a Form S-4 registration statement with the SEC. However, the cost to prepare a Form S-4 can often exceed $250,000 and take up to four months to navigate through the SEC review process.

The Utah Fairness Hearing Statute

The Utah fairness hearing statute is designed to alleviate those problems and make issuing securities in M&A transactions a more attractive alternative. The statute, which has been codified at Section 61-1-11.1 of the Utah Code Annotated (the "Utah Statute"), became effective on May 5, 2003. The Utah Statute allows Utah companies to request a "fairness hearing" with the Utah Division of Securities (the "Division"). If the Division determines that the securities (together with any other consideration) proposed to be issued are "fair," the transaction will be allowed to proceed and the securities issued will generally be freely transferable. The criteria by which the Division will determine what constitutes "fair" consideration is not set forth in the Utah Statute, but rather will be addressed by the rules currently being drafted by the Division to govern the Utah Statute.

Section 3(a)(10)

Section 3(a)(10) of the Securities Act of 1933 (the "1933 Act") provides a transactional exemption for securities issued in connection with an M&A transaction. If the requirements of Section 3(a)(10) are met, the securities issued to the target's shareholders will be exempt from the registration requirements of the 1933 Act. In order to comply with the requirements of Section 3(a)(10), however, an M&A transaction must be submitted to a hearing upon the fairness thereof before a governmental authority expressly authorized by law to conduct such a hearing. The Utah Statute has been specifically drafted to provide for a fairness hearing that satisfies the requirements of Section 3(a)(10).

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Prior to the adoption of the Utah Statute, companies undertaking M&A transactions in Utah had to either qualify for federal and state registration exemptions for the securities being issued, or register the securities with the SEC under the 1933 Act and with all applicable state securities regulatory authorities. The registration exemptions available to acquirers/issuers in M&A transactions, however, are very limited, and often no registration exemption is available, especially when the target has several unsophisticated shareholders. Thus, acquirers/issuers were often required to file a Form S-4 registration statement with the SEC and incur the substantial expense and delay attendant with processing a registration statement through the SEC.

A fairness hearing properly conducted under the Utah Statute will qualify the transaction for the exemption provided by Section 3(a)(10) and avoid the necessity of filing a Form S-4 registration statement. Importantly, upon the successful completion of a fairness hearing, the securities that are issued will generally be freely tradable (unless issued to an affiliate of the issuer). It should be emphasized, however, that a Section 3(a)(10) exemption does not exempt the issuer from the antifraud provisions of state and federal securities laws. In addition, because the Section 3(a)(10) exemption is a *transactional* exemption and not a *securities* exemption, certain resale restrictions will generally apply under state law when the surviving company is not a publicly reporting entity.

Adoption of Utah Rules

The Division is currently drafting rules to implement the Utah Statute and provide for the administrative procedures for fairness hearings. No time frame for the adoption of final rules has been set, but the Division is working diligently to adopt final rules. However, the Utah Statute provides some insight as to the administrative procedures that will be followed. Those procedures will include (a) an application to the Division, (b) a hearing on the fairness of the terms and conditions of the transaction (at which all persons to whom it is proposed to issue securities or other consideration must have an opportunity to attend), (c) adequate notice of the hearing to all such persons, and (d) a determination by the Division regarding the fairness of the transaction.

Conclusion

While it's too early to determine the exact nature of the administrative procedures the Division will ultimately adopt to determine the "fairness" of an M&A transaction, the relative ease, cost savings and speed, in comparison with a federal registration, will be dramatic. It is clear, however, that the adoption of the Utah Statute will offer Utah companies a valuable tool in undertaking M&A transactions. If your company is considering conducting an M&A transaction or if you have any questions concerning this Client Alert, please call either Thomas R. Taylor or Bradley R. Jacobsen at (801) 521-5800.

Thomas R. Taylor is a partner in the Salt Lake City office of Holme Roberts & Owen LLP, where he practices in the areas of Corporate, Securities and M&A. He is President of the Securities Section of the Utah State Bar and was recently named as one of the best Corporate and M&A lawyers in Utah by Chambers & Partners in its 2003-2004 Chambers Guide to the Best Lawyers in the USA. Bradley R. Jacobsen is a Corporate and Securities associate in the Salt Lake City office of Holme Roberts & Owen LLP and has represented clients before the Division on numerous occasions.